

## Central Law Journal.

ST. LOUIS, MO., AUGUST 29, 1902.

### POWER OF THE LEGISLATURE TO FIX THE PRICE OF COAL MINED.

The strike of the miners in the anthracite coal fields of Pennsylvania is assuming a very serious aspect and attracting the anxious attention of the whole country. We have no desire to enter into any discussion of the moral or political nature of this unfortunate controversy nor of the causes that led up to it. Just now, however, several legal aspects of the question,—of very great interest—are being debated in the public prints. They have arisen out of the attempt to force an adjustment of the difficulties. A prominent jurist of Illinois has started the discussion by an interview which appeared recently in one of the leading secular papers of the country. He stated as follows:

"The legislature of Pennsylvania has the unquestionable power to do either of two things: 1. Upon due investigation the legislature can classify the mines with reference to the depth and thickness of the coal veins and fix schedules of reasonable minimum prices per ton for mining coal and a suitable penalty against any operator who may make contracts with miners for less than such prices. This would insure to the coal miners fair and reasonable compensation for their labor and remove all just grounds of dissatisfaction and complaint on their part. Such a law would be similar to the law fixing the maximum rate of interest and the penalty for usury, to the city ordinances limiting the charges of hackmen and to the laws regulating the rates of charges of railroad corporations. 2. But the legislature, once in session for the express purpose of securing the steady operation of these anthracite mines, might conclude to take for the state itself the ownership and full control of these coal lands. It can do this under the power of eminent domain. It can enact the laws necessary for the condemnation of these lands, and the compensation therefor. It can provide for taking all of these lands or for taking enough of them to supply the demand of the public. The coal mines of this coun-

try should never have been allowed to be the subject of private ownership."

The suggestion that the legislature has the power to fix the minimum amount of wages to be paid to coal miners, we gravely doubt. If that does not violate the citizen's liberty of contract we cannot perceive how such right can ever be violated. The right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended. *Leep v. Railroad*, 58 Ark. 407, 25 S. W. Rep. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264; *Andrews v. Beane*, 15 R. I. 451, 8 Atl. Rep. 540. The power of the legislature to regulate charges or prices of any kind depends upon, first, whether it is a valid exercise of the police power, or second, whether it relates to a business of a *quasi*-public character over which the legislature has control. Thus the legislature has power to prescribe the maximum charges for the instruments and service of a telephone company. *Hockett v. State*, 105 Ind. 250, 5 N. E. Rep. 178. In a purely private business the compensation of employees cannot be regulated by the legislature. The only exception to this in the authorities is evidenced by the important case of *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. Rep. 586. In that case it was held that the act of congress making it a misdemeanor, for an attorney or other person prosecuting a claim for a pension to demand or receive a greater fee than ten dollars for his services was not unconstitutional as an interference with the citizen's liberty of contract, on the ground that congress has full control over the subject of pensions.

This rule is not to be confused with that giving the legislature the power to regulate the price of certain kinds of goods or services furnished to the public, as railroad fare or telephone charges. So also it must be remembered that the legislature has power to restrain all engaged in any employment from any contract in the course of that employment which is against public policy. In all other cases the right of every citizen freely to contract for the price of his labor, services or property is inviolable.

The other suggestion for the purchase of the mines by the state we believe to be the only practicable solution of those unfortunate conditions which pe-

riodically break out in what are known as strikes. The cupidity and selfishness of the mine operators is aggravated by the fact of their illegal combination, giving them an unfair advantage over their employees in the price of labor, and over the public in the price of the necessary commodity which they control. In such case the condemnation of the coal mines by the state, to be managed for the benefit of the public, is clearly a public use justifying its exercise under the power of eminent domain.

### NOTES OF IMPORTANT DECISIONS.

**NEGLIGENCE — CONTRIBUTORY NEGLIGENCE OF CYCLIST IN RIDING WITH BODY LOWERED OVER HANDLE BARS.**—Contributory negligence is a comparative term. The same action which might easily be perceived to come within its meaning under one set of circumstances would not under changed circumstances or different surroundings. This is well illustrated in the case of the cyclist. There are two positions assumed in riding a bicycle, one upright with the eyes directed straight ahead, and the other reclining over the bars with the eyes lowered upon the ground immediately in front of him. That this latter posture would be contributory negligence in most cases is quite apparent. There are circumstances, however, when such would not be the case. Thus, in the recent case of *Benedict v. Union Agricultural Society*, 52 Atl. Rep. 110, the Supreme Court of Vermont made an exception of the case of a cyclist riding in a road race, holding that on an issue whether a cyclist riding in a race was guilty of contributory negligence in riding with his head and body lowered over the handle bars, so that he could not see more than one or two rods ahead, it was permissible to show that that was the usual mode of riding in a race. The court said in part:

"The society had advertised the race with bicycles, offering prizes, and charging each rider a fee to enter it. The plaintiff entered the race under these conditions, and he carried his head down over the handle bars as bicyclers usually do in a race, to produce the greatest speed. He had a right to assume that the defendant expected him to ride in the usual way, and as fast as possible, if need be, to win in the race. He also had a right to expect that the defendant would exercise due care in keeping the track clear. *Bagley v. Town of Ludlow*, 41 Vt. 425; *Butterfield v. Railroad Corp.*, 10 Allen, 532, 87 Am. Dec. 678; *Jennings v. Van Shaick*, 108 N. Y. 530, 15 N. E. Rep. 4; *Feeney v. Railroad Co.*, 116 N. Y. 375, 22 N. E. Rep. 402, 5 L. R. A. 544; *Buck v. City of Biddeford*, 82 Me. 433, 19 Atl. Rep. 912; *Russell v. Town of Monroe*, 116 N. Car. 720, 21 S. E. Rep. 550, 47 Am. St. Rep. 823. Riding a bicycle or

driving a horse in a manner that would be considered reckless on a public highway, where no one is on duty keeping the road clear, and where the rate of speed is usually moderate, would not necessarily be imprudent riding or driving in a race where great speed is required, on a track for that purpose, with marshals in attendance whose duty it is to keep the track clear. Riding or driving on such a track during a fair, but not in a race, and when people with and without teams are at liberty to be on the track as elsewhere, might be most careless in speed, and in the failure of the rider or driver to carry his head and body in a way to enable him to see ahead; and yet the same riding and driving in a race, with the attending circumstances, might be within the exercise of the care and the prudence of a prudent man."

**SCHOOLS AND SCHOOL DISTRICTS—VALIDITY OF CONTRACT SIGNED BY MAJORITY OF THE BOARD INDIVIDUALLY BUT NOT AUTHORIZED AT ANY REGULAR SESSION.**—School trustees have quite a thankless job sometimes and deserve a little encouragement. Their remuneration is never extravagant and will not permit of much loss of time and expense in attending frequent meetings of the board. For this reason they quite often are tempted to vote on any proposition before the board individually without the necessity of a meeting. In doing this, however, they act right in the face of the statutes in some states and what is considered public policy in others. In Iowa, however, they would seem to take neither of these risks under the latest decision of the supreme court of that state, although earlier decisions would seem to point in another direction. In the recent case of *Johnson v. School Corporation*, 90 N. W. Rep. 713, the court held that an instrument signed by a majority of the school board of a township, and agreeing to purchase and pay for certain school supplies, provided a majority of the members sign the agreement, is the contract of the township, and not the individual contract of the members signing. It appeared from the evidence that a salesman of school apparatus induced a majority of the members of a school board to execute a contract for the purchase of school supplies, each member signing the contract separately, and without consultation with the others. No deceit was used in obtaining the signatures of the various members. The supplies were accepted and used by the district, and it was sought to charge the district with payment therefor. The court further held that the circumstances attending the execution of the contract did not render it opposed to public policy.

The authorities are not in perfect accord on this question. Thus the statutes of Illinois provide that no official business shall be transacted by the board except at a meeting. Nevertheless, the supreme court of that state has held that no loss is sustained by the school fund so as to make the directors liable, where they contract and pay for

a well without any action being taken at a meeting, since the contract is one they were authorized to make and was not unnecessary nor unreasonable in cost. *Rea v. People*, 84 Ill. App. 504, affirmed *People v. Rea*, 185 Ill. 633, 57 N. E. Rep. 778. On the other hand it was held by the Supreme Court of Arkansas that a contract to buy school desks, made by only two directors of a school district, who constitute a majority, but not at a regular meeting, nor at a special meeting on notice to the third director, is void, and warrants issued to pay therefor are also void. *Springfield Furniture Co. v. School District*, 67 Ark. 236, 54 S. W. Rep. 217.

The point of dispute in this question is whether such contracts are void on grounds of public policy. If so, they cannot be ratified nor can any recovery be had on a *quantum valebant*. *Markey v. School District* (Neb. 1899), 78 N. W. Rep. 932; *McGrevy v. Board of Education*, 6 Ohio N. P. 387. In an earlier Iowa case the supreme court seemed quite opposed to such contracts. In *Mills v. Collins*, 67 Iowa, 164, the individual members of a school board made a contract in a manner quite similar to the cases we have just discussed. In speaking of the contract the court said: "The more it is examined the more it will be seen that it is a very ingenious device. It was drawn with the purpose of capturing the members of the board separately, and forestalling their deliberate and untrammelled action as a board. The moment a member signed he was in no proper condition thereafter to act as a member of the board in the same matter. The majority became committed, by reason of their personal liability, to the purchase of the goods for the district, and without any hearing from the minority. The law contemplates that no liability of this kind should be imposed upon the districts except by the members of the board duly convened at a board meeting, and sitting in consultation. The object of the contract was to thwart the law by destroying the board's deliberative character. The evil of such a practice is far greater than would naturally occur to the minds of most men who compose our boards of school directors."

While we recognize the hardship of acquiring a meeting of the board of trustees whenever a contract is to be let, our judgment constrains us to the opinion that it is the safest rule and one which should be strictly enforced. Hardship and seeming inequitable results in individual cases should not be permitted to make bad law. Such loose methods of letting contracts would not be tolerated in a business corporation. Why should the people demand any less a degree of business sagacity and carefulness on the part of its servants. A contractor who attempts to supply labor or merchandise to a school district by any such methods should be denied any recovery. He must know, at his peril, the proper way in which to make a contract with a public officer. The courts cannot insist too strongly on this principle.

## INJUNCTIONS AGAINST STRIKES OR BOYCOTTS.

Injunctions against strikes or boycotts have been frequently granted, aside from any statute authorizing it, or where interference with a receiver's rights were not involved. A number of injunctions have been granted pursuant to the provisions of the interstate commerce act, but these it is not proposed to cite in this article, except a few incidental to the other cases cited.

Of course, the act to be enjoined must not only be unlawful, but one calculated to produce injury to the person complaining. If it is such an act as may be lawfully performed, it is an injury without a remedy.<sup>1</sup>

In a case in Massachusetts the law concerning employee and employer, and an interference either with their relations, or with their desire to enter the relation of employee and employer, is stated by Judge Allen in the following language: "An employer has the right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself. No one can lawfully interfere, by force or intimidation, to prevent employers or persons employed, or wishing to be employed, from the exercise of these rights. \* \* \* Intimidation is not limited to threats of violence or of physical injury to person or property. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which are found to exist in *Sherry v. Perkins*.<sup>2</sup> \* \* \* The patrol was an unlawful interference both with the plaintiff and the workmen, within the principle of many cases; and, when insisted upon for the purpose of interfering with his business, it became a private nuisance. \* \* \* Defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of plaintiff's premises as a means of

<sup>1</sup> *Macaulay v. Tierney*, 19 R. I. 253, 33 Atl. Rep. 1, 61 Am. St. Rep. 770.

<sup>2</sup> 147 Mass. 212, 17 N.E. Rep. 307, 9 Am. St. Rep. 689.

carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking employment by him, is outside of allowable competition, and is unlawful."<sup>3</sup> Many cases supported the principles announced in the above quotations.<sup>4</sup>

But although the act may be an unlawful one, it does not necessarily follow that a court of equity will enjoin the person who is responsible for it. A man may quit his employer at any time without fear that he will be amerced in damages, unless he is under a contract to serve him; and though he be under such a contract, a court of equity will not enjoin him, but send the employer to his action for damages. So what an employee may do any one may advise him to do without being restrained by a court of equity. So it is that words of persuasion, used by one person upon another to induce the latter to quit the services of his master or employer, are not sufficient to justify the granting of an injunction, for the employed is still free to act. But acts of intimidation accompanied by force, when sufficiently injurious to the employer, will authorize the granting of an injunction in his favor. It may well be doubted if the intimidation produced through a threat of social ostracism, or expulsion from a labor organization, whereby the employee is induced to quit the service of the employer, that would be enough to justify the granting of the writ of injunction. There are things that the employee must withstand, and if he has not iron enough in his composition to do so the courts cannot undertake to furnish a substitute. But threats of physical injury, or injury to his property, especially if accompanied by assaults or overt

acts, which are sufficient to induce a man of ordinary stamina and grit to abandon his employer, will be sufficient to authorize the issuance of an injunction.<sup>5</sup>

Something more than mere damages must be occasioned or threatened by strikers and boycotters before a court of equity will intervene and enjoin it. The person asking the injunction must be in a position that he would suffer irreparable damages if the strikers or boycotters be not enjoined, or he has no adequate remedy at law; or would be compelled to resort to a multiplicity of suits to seek redress. The insolvency of the strikers or boycotters, or their manifest financial inability to pay the damages they are occasioning, are potent factors upon which the courts act, although little or no allusion is made to that factor in the opinions. Where employees combine and confederate, for the purpose of enforcing their demand by the seizure of their employer's property, or to prevent other men, by force and intimidation, from entering such

<sup>3</sup> *Cumberland Glass Mfg. Co. v. Glass Bottle, etc. Assn.*, 59 N. J. Eq. 49, 46 Atl. Rep. 208; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. Rep. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Beck v. Protective Union*, 118 Mich. 497, 77 N. W. Rep. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *American Steel & Wire Co. v. Wire Drawers, etc.*, 90 Fed. Rep. 608; *Mackall v. Ratford*, 82 Fed. Rep. 41; *National Protective Assn. v. Cummings*, 63 N. Y. App. Div. 227, 65 N. Y. Supp. 946; *Allen v. Flood* (1898), App. Cas. 1; *Davis v. Hoisting Engineers*, 28 N. Y. App. Div. 396, 51 N. Y. Supp. 189; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. Rep. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Krebs v. Rosentstein*, 31 N. Y. Misc. Rep. 661, 66 N. Y. Supp. 42, affirmed 67 N. Y. 385; *Levy v. Rosentstein*, 66 N. Y. Supp. 101, affirmed 67 N. Y. Supp. 630; *Standard Tube, etc. Co. v. International, etc.*, 7 Ohio N. P. 87, 9 Ohio, S. & C. P. Dec. 692; *Temple Iron Co. v. Carmanoskie*, 10 Kulp. 37, 7 North Co. Rep. 258; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. Rep. 1106, 42 Cent. L. J. 74; *Murdock v. Walker*, 152 Pa. 595, 25 Atl. Rep. 492, 34 Am. St. Rep. 678; *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. Rep. 72; *Toledo, etc. Ry. Co. v. Pennsylvania Co.*, 53 Am. & Eng. Corp. Cas. 293; N. Y., etc., R. R. Co. v. Wenger, 17 Wk'ly L. Bull. 396; *Manufacturers' Outlet Co. Longley*, 20 R. I. 86, 37 Atl. Rep. 535; *In re Debs*, 158 U. S. 564, 15 U. S. Rep. 900, affirming 64 Fed. Rep. 724. A conspiracy to prevent the loading or unloading of a vessel, by such labor as may be acceptable to the defendants, may be enjoined though no overt act against that particular vessel be alleged or proved. *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. Rep. 310; *Elder v. Whitesides*, 72 Fed. Rep. 724. See *Blindell v. Hagan*, 54 Fed. Rep. 40. A court of equity will not compel workmen to remain in the employ of their employer against their will. *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. Rep. 310. See generally *Southern Ry. Co. v. Merchants' Local Union*, 111 Fed. Rep. 49, as to persecution.

<sup>3</sup> *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. Rep. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722.

<sup>4</sup> *O'Neil v. Behanna*, 182 Pa. St. 236, 37 Atl. Rep. 843, 61 Am. St. Rep. 702; *Cote v. Murphy*, 159 Pa. St. 420, 39 Am. St. Rep. 686, 28 Atl. Rep. 190; *Dela-ware, etc. R. R. Co. v. Bowns*, 58 N. Y. 573; *Wick China Co. v. Brown*, 164 Pa. St. 449, 30 Atl. Rep. 261; *Murdock v. Walker*, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. Rep. 492; *Opis Steel Co. v. Local Union*, 110 Fed. Rep. 608; *Southern Ry. Co. v. Merchants' Local Union*, 111 Fed. Rep. 49.

employment, they may be enjoined.<sup>6</sup> Such acts may be enjoined on the ground of preventing a multiplicity of suits, and the inadequacy of an action at law.<sup>7</sup> It is immaterial that the acts sought to be enjoined are punishable as a crime, if they are otherwise injurious to the complainant, and he is without an adequate remedy at law, or would be compelled to resort to a multiplicity of suits to vindicate his rights.<sup>8</sup> A court, however, will not enjoin an employee from quitting his master's service; nor will it enjoin any number of them entering into a combination or agreement, or a conspiracy, if you please, to quit upon the happening or not happening of an event. Courts have never undertaken to compel men to work; and they will not attempt to do so even though they are working for the receiver of a great railway company, and even though the stoppage of its traffic would produce irreparable injury to all engaged in shipping over its line.<sup>9</sup>

In a case in the United States Circuit Court for the District of Indiana, upon the application of "The W. B. Conkey Company," engaged in the printing business, the court enjoined its striking employees, and all persons then or thereafter aiding or abetting them, from in any manner interfering with or preventing those in its employment from working for the company; and restrained them from entering on the company's grounds to induce by threats, intimidation, persuasion or force, such employees to refuse or fail to do their work or discharge their duties, to leave its service, or by the same means to attempt to prevent others entering into the service, or to compel the company to discharge its men. The court also restrained the strikers and their associates from gathering on the streets or approaches adjacent to the factory for the purpose of intimidating the company's employees, or from tendering service, or "picketing" or

erecting them or its officers or preventing them "patrolling" such streets or approaches; and also restrained them from going, either singly or collectively, to the houses of such employees for the purpose of inducing them, by threats or intimidation, to leave the company's service, or to induce by like means others not to enter into the service, or in any way to intimidate the wives or families of such employees.<sup>10</sup> Where the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of plaintiff from continuing in such employment, and to prevent others from entering into it, and to carry out the scheme caused threatening banners to be carried in front of the plaintiff's shop, the effect of which was to deter persons from continuing to work for or engaging with plaintiff, whose business was thereby injured, the court granted an injunction restraining the carrying or displaying of the banner. The defendants were the president and secretary of the Lasters' Protective Union, and they caused a banner to be carried in front of the plaintiff's shoe factory. One banner had upon it the words, "Lasters are requested to keep away from P. P. Sherry's. By order L. P. U." Another banner had on it, "Lasters on a strike; all lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U."<sup>11</sup> In a case already quoted from<sup>12</sup> the facts were as follows: Following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol

<sup>6</sup> Lake Erie, etc. Ry. Co. v. Bailey, 61 Fed. Rep. 494; Coeur D'Alene Consol. Mining Co. v. Miners' Union, 51 Fed. Rep. 200, 19 L. R. A. 382; Old Dominion S. S. Co. v. McKenna, 30 Fed. Rep. 48; New York, etc. R. R. Co. v. Wenger, 17 Wkly. L. Bull. 306.

<sup>7</sup> Blindell v. Hagan, 54 Fed. Rep. 40, affirmed 56 Fed. Rep. 696.

<sup>8</sup> Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. Rep. 310; Hopkins v. Oxley Stave Co., 28 C. C. A. 99, 83 Fed. Rep. 912.

<sup>9</sup> Arthur v. Oakes, 11 C. C. A., 209, 63 Fed. Rep. 310, reversing Farmers' Loan & Trust Co. v. Northern Pacific Ry. Co., 60 Fed. Rep. 803.

<sup>10</sup> That persons not served with process may be enjoined by a preliminary injunction, see American Steel & Wire Co. v. Wire Drawers, etc., 90 Fed. Rep. 598; American Steel & Wire Co. v. Wire Drawers, etc., 90 Fed. Rep. 608. It is said that the two cases furnished the precedent in the W. B. Conkey Company's case. Contempt proceedings arose in this case and on appeal from a fine assessed was taken to the United States Court of Appeals and by that court certified to the United States Supreme Court upon the question whether it had jurisdiction of an appeal in a contempt case. The case is now pending in the Supreme Court.

<sup>11</sup> Sherry v. Perkins, 147 Mass. 212, 17 N. E. Rep. 307 9 Am. St. Rep. 689.

<sup>12</sup> Vegelahn v. Guntner, *supra*.

of two men in front of the plaintiff's factory, maintained from half-past six in the morning until half-past five in the afternoon, on one of the busiest streets in Boston. The number of men were greater at times, and at times showed some disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not, however, obtruding beyond the point where the other person was willing to listen. The patrol was maintained as one of the means of carrying out defendants' plan, and it was used in combination with social pleasure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. Of these acts the court said: "It was their one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and employed." An injunction was granted which related to persons both under contract of employment and to those desiring to enter into such contract. Where striking workmen indulged in more or less continuous acts of violence, consisting in assembling in crowds at the employer's premises, in streets and at the railroad station, occasionally attacking property, frequently using obnoxious language toward the employees, forcibly interfering with persons seeking to enter the premises, and forcibly interfering with employer's in-coming workmen at the station, an injunction was granted against an association of which such striking workmen were members, to prevent interference with workmen engaged, although such association instructed all striking members to use only peaceable methods in persuading others to quit work.<sup>13</sup> Where a trades' union, in consequence of a dispute with reference to an alleged preferential employment of non-union men by a building firm, published a poster headed, "Trollope's Black List," containing the names of non-union men employed by the firm, the court applied to granted a preliminary injunction, holding that the trades' union had done more in fact than

was necessary for their own protection.<sup>14</sup>

It is not unlawful to patrol a factory merely for the purpose of ascertaining the names of those entering in order to peaceably persuade them not to continue in such employment. Such acts must be accompanied by others amounting to an intimidation, and it may be said that mere threats not producing intimidation are not sufficient.<sup>15</sup> Nor is the mere furnishing of money to those striking, accompanied by words of advice and persuasion.<sup>16</sup> So an injunction will be refused to prevent a persecution of plaintiff's company and some of its employees by strikers, boycotts or violence, or intimidation, even if accompanied with a threat to do any unlawful act, where a statute provides that it shall not be unlawful to make a peaceable combination for or against employment.<sup>17</sup> But of this statute it was said in a subsequent case, that "It did not legalize a conspiracy to injure a man's business, to be effected by means other than those of combination to enter into or leave his employment; and a combination to injure a man in his business by a concerted action on the part of an immense number of persons to cease dealing with him, by threats to withdraw their custom from them, for the purpose of obliging him to accede to their demands, or, in other words, to boycott him, has not been made lawful by the statute."<sup>18</sup> So an injunction was issued to restrain a union from distributing circulars, printed resolutions, bulletins or other publications containing appeals or threats against a newspaper company, or its publishers, with intent to injure its or their business in publishing its paper, and from making any threats or using any in-

<sup>14</sup> *Trollope v. London, etc. Federation*, 72 L. T. 342. That a court of equity will enjoin the carrying of banners containing on them assertions that are libelous and injurious to the plaintiff's trade, see *Beck v. Railway Tea masters, etc. Union*, 118 Mich. 497, 77 N. W. Rep. 13, 74 Am. St. Rep. 21.

<sup>15</sup> *Cumberland Glass Manufacturing Co. v. Glass Bottle, etc.*, 59 N. J. Eq. 49, 46 Atl. Rep. 208. In England otherwise by statute, *Lyons v. Wilkins*, 65 L. J. Ch. 601 (1896), 1 Ch. 811, 74 L. T. 358, 45 W. R. 19, 60 J. P. 325; *Queen v. Druitt*, 16 L. T. (N. S.) 855.

<sup>16</sup> *Cumberland Glass Mfg. Co. v. Glass Bottle, etc.*, *supra*; *Rogers v. Evarts*, 17 N. Y. Supp. 264; *Levy v. Rosentein*, 66 N. Y. Supp. 101, affirmed 67 N. Y. Supp. 630, 56 N. Y. App. Div. 618; *Sweeney v. Torrence*, 11 Pa. Co. Ct. Rep. 497, 1 Pa. Dist. Rep. 622.

<sup>17</sup> *Mayer v. Journeymen Stone Cutters*, 47 N. J. Eq. 519, 20 Atl. Rep. 492.

<sup>18</sup> *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. Rep. 881.

<sup>13</sup> *Cumberland Glass Mfg. Co. v. Glass Bottle, etc.*, 59 N. J. Eq. 49, 46 Atl. Rep. 208; *Consolidated Steel, etc. Co. v. Murray*, 80 Fed. Rep. 811. As to circulars, see *Cohen v. United Garment Workers*, 72 N. Y. Supp. 41.

N. Y. Misc. Rep. 748.

timidation to the dealers or advertisers in the newspaper tending to cause them to withdraw their business from it."<sup>19</sup>

A similar case arose in Pittsburg, where a boycott was declared on a laundry that had discharged eleven girl employees, and a few others left, out of a total of ninety employed. Agents of the Knights of Labor visited the laundry, who demanded that the girls who had left be reinstated, saying, if they were not it would be to the injury, if not the ruin of the plaintiff's business. Circulars were issued, giving what purported to be a history of the difficulty, and asking all persons to cease patronizing the plaintiffs. A sign was placed on a building in Pittsburg having on it in large letters "Headquarters Brace Bros. Boycott Committee." The circular described was followed by others of a similar import, on some of which were the words "Boycott Brace Bros." Men followed the laundry's wagons, took down the names of their customers, and afterwards visited them, endeavoring to persuade them from patronizing the laundry. Men in buggies, bearing banners on each side on which were the words, "Boycott Brace Bros." followed the laundry wagons. Often men and boys followed, shouting after the company's drivers. Persons visited the laundry's agents and requested them as such to cease acting, and on their refusal so to do circulars were issued denouncing them, and asking the public not to patronize them. Men were placed in front of the agents' stores, who distributed circulars in large numbers, whereby large and noisy crowds were collected. All their agents except one declined to do business with the laundry, and many customers withdrew, giving as their reasons these demonstrations against the laundry. An injunction was granted on the ground that the injury was irreparable, as there was no adequate remedy at law, and that the remedy at law would involve a multiplicity of lawsuits.<sup>20</sup> But the mere exhibition of placards that the plaintiff is opposed to labor unions will not be enjoined.<sup>21</sup> Nor will the issuance of circulars denouncing plaintiff's workmen as "scabs,"

where it is not shown whether employees were compelled to leave through moral persuasion or by intimidation, or whether alienated customers derived their information from the circulars or from other sources.<sup>22</sup> But in England printing and publishing cards for the purpose of intimidating workmen, as a part of a scheme to prevent work and destroy the value of plaintiff's property, was enjoined.<sup>23</sup> So where a circular contained the statement that a strike was now on at plaintiff's place of business, against the "sweating system," the statement being false, an injunction was granted.<sup>24</sup> The mere patrolling of a place is not sufficient, where only counseling and advising are resorted to, no acts of violence being used.<sup>25</sup> Nor will a newspaper be enjoined from advising workmen to break their contracts of service with their employers.<sup>26</sup> Nor will the injunction be granted merely by showing acts of persuasion coming from a band of fellow workmen, who have confederated together for that purpose.<sup>27</sup>

In the case of a boycott, which almost, if not universally, accompany labor troubles or crises, intimidation of the employees or of the employer is not essential. In nearly all these cases there are acts of intimidation and threats of personal violence or injury to physical property; but such threats are not essential to authorize the granting of an injunction to protect the business of the person injured. There need be no threats against the employer's servants, nor acts of intimidation to prevent laborers entering into his employment. The acts may be of such a character as to drive away his customers, by threat to boycott them if they do not cease to trade with the obnoxious person. If such threats, especially when accompanied by public demonstrations tending to bring down upon him public censure, or odium, induce his customers to quit dealing with him and prevent others coming, to his serious loss, especially when the acts are performed to com-

<sup>19</sup> *Richter v. Journeymen Tailors' Union*, 24 Ohio L. J. 189.

<sup>20</sup> *Spring Bed Spinning Co. v. Riley*, L. R. 6 Eq. 551, 37 L. J. Ch. 889.

<sup>21</sup> *Collard v. Marshall* (1892), 1 Ch. 571.

<sup>22</sup> *Levy v. Rosentstein*, 66 N. Y. Supp. 101, affirmed 67 N. Y. Supp. 630, 56 N. Y. App. Div. 618; *Krebs v. Rosentstein*, 31 N. Y. Misc. Rep. 66, 66 N. Y. Supp. 42, affirmed 67 N. Y. Supp. 385.

<sup>23</sup> *Rogers v. Evarts*, 17 N. Y. Supp. 264.

<sup>24</sup> *Johnson Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393.

<sup>19</sup> *Casey v. Cincinnati, etc. Union*, 45 Fed. Rep. 135, 12 L. R. A. 193.

<sup>20</sup> *Brace v. Evans*, 35 Pitts. L. J. 399, 3 Ry. & Corp. Law J. 361, 5 Pa. Co. Ct. Rep. 163. See *Sweeney v. Torrence*, 11 Pa. Co. Ct. Rep. 497, 1 Pa. Dist. Rep. 622.

<sup>21</sup> *De Pear v. Cooks Union*, 27 Ch. L. N. 387.

pel him to do something demanded or requested contrary to his judgment or desire. an injunction will be granted upon the application of the person whose business is thus injured.<sup>28</sup> A single act of trespass is not enough to authorize the granting of an injunction, even though the trespass is in entering the plaintiff's premises to call out workmen, accompanied by publications announcing the withdrawal of a union from the plaintiff's shop with the exercise of influence causing him the loss of the city printing, and of two private customers during a space of ten months, with threats of the union to make war to the knife and fight the plaintiff to death; for these facts do not show such an irreparable injury threatened as will justify equitable relief.<sup>29</sup> In a boycott against a printing office for refusing to unionize it and pay laborers union prices, an injunction was granted where loss of business was caused through circulars sent by the defendants; and statements of advances made to the plaintiff's agents assigning that reason as a cause for withdrawing patronage was held competent evidence.<sup>30</sup> Where violent means had been used in a boycott it was held error to only enjoin the violent acts, but permit the use of forcible means, or any means short of violence; for the boycotting condemned by law is not only that accompanied by violence, but also that where the means used is threatening, and intended to overcome the will of others.<sup>31</sup>

A labor union is not liable to a workman discharged upon its demand when no force is used.<sup>32</sup>

W. W. THORNTON.

Indianapolis, Ind.

<sup>28</sup> *Matthews v. Shankland*, 25 N. Y. Misc. Rep. 604, 56 N. Y. Supp. 123; *Oxley Stave Co. v. Coopers, etc.*, 72 Fed. Rep. 685.

<sup>29</sup> *Long Shore Printing Co. v. Howell*, 26 Oreg. 527, 38 Pac. Rep. 547, 28 L. R. A. 464, 40 Cent. L. J. 245, 46 Am. St. Rep. 649; *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *Mechanics' Foundry v. Ryall*, 62 Cal. 416; *Reynolds v. Everett*, 144 N. Y. 189, 39 N. E. Rep. 72; affirming 67 Hun, 294.

<sup>30</sup> *Casey v. Cincinnati, etc. Union*, 45 Fed. Rep. 135, 12 L. R. A. 193.

<sup>31</sup> *Beck v. Railway Teamsters, etc. Union*, 118 Mich. 497, 77 N. W. Rep. 13, 74 Am. St. Rep. 421.

<sup>32</sup> *National Protective Assn. v. Cummings (N. Y.)*, 63 N. E. Rep. 386.

#### COMMERCIAL EXCHANGE—ARBITRATION OF DISPUTES AS A CONDITION OF MEMBERSHIP.

#### EVANS V. CHAMBER OF COMMERCE OF MINNEAPOLIS.

*Supreme Court of Minnesota, June 20, 1902.*

A by-law of a commercial exchange provided for the suspension of a member if he should refuse to submit to arbitration a business dispute with another member after being duly notified, and after a hearing had before the board of directors, and, further, that, if the gravity of the offense was deemed such as to merit it, the member in fault might be expelled from the association. Held, that this by-law was not invalid on the ground that it contravened the constitution of the laws of the state, or was against public policy. It did not operate to oust the courts of the jurisdiction conferred upon them, to determine all disputes and differences which may arise between individuals.

**COLLINS, J.:** The following correct statement of the facts herein was made by the court below: "Plaintiff was a member of the Minneapolis Chamber of Commerce, defendant association, and still holds a membership in the same. While he was a member in good standing, a fellow member asserted a claim against him, growing out of board dealings between them, made under the customs and regulations of the association relating to the purchase and sale of wheat and other cereals for future delivery, and demanded that said claim be submitted to voluntary arbitration, in accordance with the by-laws and rules of the association. The plaintiff failed to submit the matter after notice duly given. Thereupon, such failure being properly brought to the attention of the board of directors, the plaintiff was expelled from the association. He brought this action to obtain a decree of this court that he is a member in good and regular standing of the defendant association and a judgment that it accord to him all the rights and privileges of membership therein."

Under the stipulated facts no question has been raised as to the regularity of the proceedings had by the defendant under its by-laws—hereinafter referred to as rules—which resulted in plaintiff's expulsion, and it is expressly agreed that the right and power of the association to expel him is the question at issue in the action. The rules of the defendant respecting arbitration between its members, by virtue of which plaintiff was expelled, asserted by him to be invalid, are in substance as follows: A board of arbitrators consisting of members is created, and the power and duty conferred to investigate and decide all disputes and differences between members of the association, of a financial or commercial character, which may be voluntarily submitted to it. If a member desires to submit a dispute or difference he is required to file a complaint with the secretary stating all the facts and particulars of the controversy and the name of the member with whom it has arisen. A copy of this complaint is served on the latter, and he is required to appear

and answer within six business days after service of such copy. Failing so to do, he is deemed in default "and to have incurred the penalties of a refusal to join in submitting to arbitration." He may then be charged with failure to comply with the rules and an investigation may be ordered, which is had before the board of directors. If the charges shall be sustained upon a hearing, the member stands suspended from all the privileges of membership until, in the judgment of the board, the matter complained of shall have been satisfactorily settled. Should, however, the gravity of the offense be deemed such as to merit expulsion, the member in fault may be expelled from the association. It was under these rules that the plaintiff in this action was expelled, and his counsel contends that the statute under which the defendant was organized (Gen. St. 1894, § 2982) not only fails to authorize such rules, but, on the contrary, that they are in contravention of its plain implication and spirit.

The proposition is that the rules enforced in this case are invalid because they contravene the constitution and the law of the state and are against public policy. It is undoubtedly true that parties cannot control the course of justice or effectually oust the courts of the jurisdiction which has been conferred on them, by mutual agreement so to do. That an agreement to submit disputes to arbitration will be held invalid, in law and in equity, when the effect is to deprive the courts of jurisdiction to determine such disputes, is conceded. The principle on which this doctrine rests is that every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws of all these courts may afford him. He cannot bind himself in advance to forfeit his right to this protection, at all times and on all occasions, whenever the case may be presented. The law, and not the contract, prescribes a remedy for all disputes, and parties have no more right to enter into stipulations against a resort to the courts for the remedy in a given case than they have to provide a remedy prohibited by law. The doctrine is summed up as follows: Where parties enter into an absolute agreement or covenant that, in case a dispute shall arise under a contract between them, all matters in difference relating thereto shall be submitted to arbitration which is final and conclusive, such stipulation is void on the grounds of public policy, because to give effect to it would be to oust or deprive the courts of their jurisdiction over parties and disputes. This cannot be permitted or allowed, for, if it were, the fundamental, as well as the statutory, law of the land would be disregarded, ignored, and set aside. All the rules and by-laws of this corporation and all other corporations are subject to the doctrine that not one can be enforced in a court of law or equity which is in any way inconsistent with the constitution or the laws of the state, or of the United States, or which is contrary to public policy; so that at the final analysis the inquiry is: Are the rules in

question, providing for the expulsion of members by the defendant association and in which the action complained of was based, contrary to the constitution of statutes of the state, or are they opposed to public policy? We are of the opinion that they are not. When the plaintiff applied for admission to the association he pledged himself to carry out, as far as was within his power, its primary objects, and one of these was to "facilitate the speedy adjustment of disputes between members. He also pledged himself to abide by the by-laws and rules of the association and all amendments thereto, and among them were the by-laws or rules providing for and regulating the voluntary submission of all differences of dispute to arbitration, and, further, if a member refused so to do, that he could be disciplined, there being provided, among other methods of discipline, the penalty of expulsion from membership. He expressly agreed that he would arbitrate business difference arising between him and his fellow members as a condition of retaining this membership. When the membership and the rights pertaining thereto were conferred upon him, on his voluntary application for such membership, they were accompanied by, and there was annexed to the same, the condition that these rights could be taken away by the association upon the happening of certain events, and that the applicant could be expelled if he refused to abide by this condition attached to the membership. This is nothing new or novel, for such conditions are annexed to membership in many societies or associations, social, fraternal, and religious. In these organizations, as well as in defendant association, membership subject to conditions is optional, not compulsory. All members became such voluntarily, stipulating to conform to the by-laws or to submit to expulsion, which is nothing but a self-inflicted exclusion from membership rights and privileges. As expressed in some of the cases, such a membership is "clogged with conditions." The doctrine that these rules are valid and enforceable is upheld in many adjudicated cases, and but one or two can be found in opposition, none being recent. In *Greer, Mills & Co. v. Stoller* (C. C.), 77 Fed. Rep. 1, the court thus expressed itself concerning a like rule: "The complainant occupies in this controversy the anomalous attitude of claiming the privileges and benefits attaching to and ensuing from the association, while denouncing as illegal and inoperative that portion of the articles designed to make the combination effective and obligatory upon the associates. It may be conceded that in respect of a certain character of contracts they may be good in part and bad in part, so that the court may enforce that which is valid and reject that which is vicious; but that is not this case. The rights of the plaintiff being bottomed on its having become a member of the association by subscribing to its articles and its by-laws, can it, under such a compact, ask a court of equity to restore it to fellowship while

rejecting a part of the creed of the order? Waiving any question of whether or not certain provisions of the articles of agreement and by-laws are contrary to public policy, the fact remains that had the complainant declined, when it applied for admission to the association, to submit to and accept the articles and by-laws as a whole, it would not have been admitted to membership." In that case plaintiff, a corporation, had appealed to a court of equity to reinstate it after suspension of membership. The same idea is expressed, in different language, in *Belton v. Hatch*, 109 N. Y. 593, 17 N. E. Rep. 225, 4 Am. St. Rep. 495: "Whatever are the rights acquired by a member and created by his admission to membership, the rules by which the membership is created or dissolved, and which control the affairs of the organization and the relations of the members, entered into those rights when created and remained part of them. In this proposition there is nothing against public policy, for the reason that whatever a member acquires is subject to the self-imposed condition that his title and the rights which accrue from his membership are regulated by and dependent upon the laws adopted by the association, and expressly assented to by him when he joined. \* \* \*

When membership and the rights belonging to that status were conferred upon him, the gift was accompanied by a condition that the rights of whatever nature should revert to the association upon the happening of certain events; and he cannot be heard to complain, nor can other persons claiming to derive under him." There the association, after suspension of a member, disposed of his membership and a seat therein for \$25,000, and his assignee attempted to recover the amount, but was defeated.

Again, it is said in *Haebler v. New York Produce Exchange*, 149 N. Y. 414, 44 N. E. Rep. 87, that: "The relator had a right to become a member of this corporation (New York Produce Exchange) and to agree to be governed by its charter and by-laws, and when he did so they expressed the contract by which he and every other member were bound, and which measured their rights, duties, and liabilities as members thereof. A member of a corporation may so hedge himself in by agreement as to yield the protection which one seeks in the ordinary affairs of life, and enlarge the authority that may be used against him." This action was to restrain a hearing, under a complaint that a member had disregarded his membership agreement and was subject to expulsion. These cases are in point, and we also cite *People v. Board of Trade of City of Chicago*, 45 Ill. 112; *Baxter v. Board*, 83 Ill. 146; *Dickenson v. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 644; *Lewis v. Wilisor*, 121 N. Y. 284, 24 N. E. Rep. 474; *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. Rep. 887; *Van Pouché v. Society*, 63 Mich. 478, 29 N. W. Rep. 863; *Com. v. Union League of Philadelphia*, 135 Pa. 301, 19 Atl. Rep. 1080, 8 L. R. A. 195, 20

Am. St. Rep. 870; *Vaughn v. Herndon*, 91 Tenn. 64, 17 S. W. Rep. 793. The error which prevails in a few cases, in which an opposite doctrine has been announced, lies in the fact that the broad distinction was not observed which exists between an attempt to enforce in the courts an absolute agreement to waive, disregard, and ignore the ordinary methods of settling disputes, and an effort to compel compliance with an agreement made between individuals, as a condition to becoming and remaining members of a voluntary association for business purposes, that they will settle their business differences in a prescribed way. See *Lewis v. Wilson*, *supra*. In *Farmer v. Board*, 78 Mo. App. 557, a case directly in point, this distinction is referred to thus: "It is well known that parties cannot, by agreement to arbitrate future differences, oust the courts of jurisdiction; but that principle of law does not affect our statement that the association may have a rule requiring all differences between members to be settled by arbitration and to impose expulsion as a penalty for disobedience of such rule. These associations not only provide for arbitration of future differences, but they sometimes provide that a verbal agreement, invalid by the statute of frauds, shall be valid. They sometimes provide that a debt shall be a subsisting claim though it would not be under the statute of limitations. If parties get into the courts of the country, and one of them should set such agreement against the other, the court would not allow it any force, but would proceed to apply the law without regard to the agreement; but the association may nevertheless enforce, not the agreement to arbitrate or to recognize a verbal contract, etc., but the penalty for refusing. For the refusal is a violation of its rules, which the member has agreed to obey." See, also, *Brandenburger v. Association*, 88 Mo. App. 148. It is significant that neither of these cases was appealed to the supreme court, so far as we can discover. It is also significant that the earlier case of *State v. Union Merchants' Exch. of City of St. Louis*, 2 Mo. App. 96, relied upon by plaintiff's counsel here, is not mentioned in either. It was cited in one of the briefs in the *Farmer* case, and therefore was not overlooked. It was simply ignored. The conclusion to be deduced from the authorities quoted from and cited is that it is a general rule of law, applicable to such voluntary associations, that a member must either submit to its rule or surrender his membership. It is optional with him to retain his membership by complying with the by-laws or to surrender it and cease to be a member by refusing to comply. The interest of each member in the organization is subject to its constitution and the by-laws, which express and regulate the contract by which he has consented to be bound, and they are conclusive upon him in respect to the mode of transacting his business and of his right to continue to be a member. Because such by-laws and rules give to the board of directors power to discipline only

when a member refuses to arbitrate, as he has agreed to do in consideration of the rights and privileges of membership, and no attempt is made to deprive him of an opportunity to litigate his differences in the ordinary way, they are not unreasonable, coercive, violative of constitutional rights, or contrary to public policy. Order affirmed.

NOTE—*Validity of Provisions in the Constitution or By-Laws of Voluntary Associations Restricting the Right of Its Members to Invoke the Action of the Courts in Deciding Controversies Between Themselves or with the Order.*—There is some conflict of opinion as to the extent to which a voluntary association may go in restricting actions at law between its members; some of the cases holding that it may prohibit actions at law altogether and make its own decisions conclusive; others holding that it may not materially restrict the right to sue. The reason and weight of authority is with the latter cases. It certainly is not within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlement of controversies. And the weight of authority is very decidedly against the power of parties to bind themselves in advance that a controversy that may possibly arise shall be conclusively settled by an individual or a corporation. *Bauer v. Knights of Pythias*, 102 Ind. 262; *Insurance Co. v. Morse*, 20 Wall. 445; *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Wood v. Humphrey*, 114 Mass. 185.

The cases on this subject are interesting as evidencing the hesitation of some of the courts. In the case of *Vaughn v. Herndon*, 91 Tenn. 64, 17 S. W. Rep. 793, it appeared that the charter of the *Clarksville Tobacco Board of Trade* authorized and required the settlement of business differences among its members by committees of arbitration appointed for that purpose. The court went to the extent of holding that a final award of the constituted committee of arbitration duly appointed by such board of trade upon matters of dispute between its members, if fairly made, was conclusive upon the parties. The court says, in commendation of this scheme: "The provision of this charter and the by-laws thereunder are wise legislation, and will operate to prevent much needless and expensive legislation as well as promote the welfare of commerce, if correctly enforced." This case is cited by the principal case in support of its position. It is evident that the decision here made is a much more radical one; indeed, it is quite contrary to some of the *obiter* remarks made in the opinion in the principal case. Thus it is there said: "If parties get into the courts of the country, and one of them should set up such an agreement against the other, the court would not allow it any force, but would proceed to apply the law without regard to the agreement." This, we believe, states the true rule of law which is absolutely contrary to that announced in the *Tennessee* case just cited.

The cases cited by the principal case like that of *Commonwealth v. Union League*, 135 Pa. St. 301, refer to provisions for determining obedience or disobedience to rules and discipline of a purely social organization. In such cases there is no controversy, the courts always declining to interfere on the ground that there is no property interest at stake. But where money or property or real business interest or contracts are involved the courts are strongly inclined to encourage a settlement of such differences in the way provided by law. A case apparently contrary to this statement of

the law is that of *Von Poucke v. St. Vincent de Paul Society*, 63 Mich. 378, where it was held that the determination of a "sick committee" of a lodge that a certain member was not sick and therefore not entitled to sick benefits was final. See, also, *Osecola Tribe v. Schmidt*, 57 Md. 98. We do not feel that, without some modification, this decision is supported by either reason or authority. A sick benefit is a contract right for which the lodge has received a consideration and no stipulation can deprive the member from appealing to the courts when unjustly deprived of benefits under the provisions of his contract. Some cases go to the extent of holding, however, that although the courts have jurisdiction to hear and dispose of a complaint against a lodge for refusal to allow sick benefits, yet, where the laws of the lodge provide a remedy for the grievance complained of, that remedy must first be pursued and exhausted and that a failure to pursue that remedy is a perfect defense to an action in any state court. *Levy v. Mag-nolia Lodge*, 110 Cal. 297; *Grant v. Langstaff*, 52 Ill. App. 128; *Kentucky Lodge v. Limeback*, 8 Ky. Law Rep. 705.

The case of *Lewis v. Wilson*, 121 N. Y. 284, is very clear in support of the distinction announced in the principal case. In that case plaintiff who was a member of the *New York Stock Exchange*, was tried by the complaint committee of the exchange and found guilty of violating a contract with another member. Upon failure to pay the sum adjudged against him plaintiff was suspended from membership in the exchange in accordance with the provisions of its constitution. In an action to compel his reinstatement, plaintiff claimed that the alleged contract was a gambling contract, and so that its violation was not a "breach of contract," and did not render him amenable to suspension under the rules. The court held that whether the contract was valid or void was irrelevant; that plaintiff could not insist upon *remaining a member* of said exchange, and at the same time repudiate its conditions of membership and refuse to comply with its rules. See also *Rorke v. Exchange*, 99 Cal. 196, 33 Pac. Rep. 881; *Dickenson v. Milwaukee Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544.

The argument of the cases which announce a different rule rest on much that is sound reason, and which is tending to make exceptions to the rule just stated. The general principle underlying all these cases is well stated in *Blumenthal v. Chamber of Commerce* (Ohio, 1882), 7 Wkly. L. Bull. 327. It was there held that the question of a member's consent to a by-law of an association, providing for expulsion, can only arise as to a by-law which the corporation had a right to make, and which is not contrary to public policy or in positive contravention of law. On this ground it was held that an exchange could not suspend a member, under a by-law authorizing it to do so for non-fulfillment of a contract, before the rights of the parties had been settled at law, such by-law being contrary to public policy. *People v. Exchange*, 29 N. Y. S. 307; *In re Haebler*, 36 N. Y. S. 427. Both these cases, however, were overruled by the *New York Court of Appeals*. *People v. Exchange*, 149 N. Y. 401, 44 N. E. Rep. 84; *Haebler v. Exchange*, 149 N. Y. 414, 44 N. E. Rep. 87. Both these cases are exhaustively reasoned, and furnish interesting comment on this question. The argument, however, advanced by the supreme court was not lost on the court of appeals, for in another case that went up that court modified its decision to some extent. *In re Lurman*, 90 Hun, 303, 35 N. Y. S. 956, affirmed by the court of appeals, 149 N. Y. 588, 44 N. E. Rep. 1125. In this case a member of a coffee ex-

change was suspended for failure to furnish another member coffee of a certain grade, according to sample, as he agreed to do. In seeking reinstatement the plaintiff insisted that the sample was adulterated and that he could not have complied with his contract without violating the law. The court held that for the refusal to violate the law of the land, no corporation or society, voluntary or otherwise, can expel or suspend a member, whatever may be its by-laws. So also it has been held that if the by-laws are unreasonable, a violation thereof will not justify the suspension or expulsion of the member. *State v. Exchange*, 2 Mo. App. 96. In this case it was held that a by-law of the St. Louis Union Merchants' Exchange, which compels members to submit their business controversies to arbitration, on pain of suspension or expulsion, is unreasonable and void. The court said: "Is it not a fatal objection to the by-laws of this exchange, on the subject of arbitration, that they compel every respectable merchant of the city, on the pain of losing caste, and being deprived of means essential to the carrying on of business on equal terms, to submit every controversy arising in the course of trade to a tribunal which is not bound by legal rules, and which may, if it so chose, utterly disregard, in forming its decision, every ruling of the courts and every legislative enactment?" See also *Savannah Cotton Exchange v. State*, 54 Ga. 668. In this case the arbitration board of an exchange expelled a member for failing to comply with its judgment upon a business transaction with another member. The court held the expulsion not legal, saying: "If the cotton exchange has the authority to act as an arbitration court under its charter, its awards are subject to be reviewed and examined, so far as the legal rights of the parties are concerned, by the judicial tribunals of the state, in the same manner as are the awards of other arbitrators."

#### JETSAM AND FLOTSAM.

##### CHRISTIANITY AND THE COMMON LAW.

Our learned and esteemed contemporary, *The Green Bag*, in an interesting article discusses the relation of Christianity to the common law. It says in part:

"In the words of Judge Story the divine origin and truth of Christianity are admitted by the common law and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers, or the injury of the public. He who reviled, subverted or ridiculed Christianity could be punished at common law, because he struck at the root of society and disturbed the common peace of which the common law was the preserver. The common law took cognizance of offenses against God only when by their inevitable effect they became offenses against man and his temporal security.

There are two other matters to which reference should be made in considering the relation of Christianity to the common law, for they illustrate the limitations of the doctrine. Lord Hale has said, and he was followed by our own Kent, that blasphemy was a crime, among other reasons, because one of its evil consequences was to impair the efficiency of an oath, being inconsistent with the reverence due to the latter; and tending to lessen in the public mind its religious sanction. This understanding of the common law can hardly be correct. The consensus of American opinion at least is that the sanction of an oath is the fear and invocation of some god not necessarily

the God of the Scriptures; that he, therefore, who believes in any god—whether Christian or pagan—to reward virtue and punish vice either here or hereafter, and to bind an oath upon the conscience of the witness by the penalty of his displeasure, is a competent witness, nor need that belief or anticipated punishment have any reference to a future life. Only he who believes not in any god can be bound by no religious tie and is at common law incompetent to testify in a court of justice. Thus it appears that our doctrine of the binding force of an oath does not stand or fall by the presence of the teachings of Christianity as an essential part of the common law.

Secondly, it may be asked, do the statutes regulating Sabbath observance rest upon any tacit recognition of Christianity as the state religion, or imply the existence of an alliance between that faith and the body politic? Wherever this question has come before the courts for answers they have held uniformly in the negative. The laws imply nothing more than this, of which no law can lose sight but to its own detriment, that the religion of Christianity is in fact and indeed the faith of the land. The laws, therefore, which enforce abstinence from labor upon the Christian Sabbath have nothing to do with religion as such. They are merely calculated to protect the social customs of the people and preserve the public peace; they are mere civil regulations resting not on grounds of religion or morality, but on principles of policy, and made for the government of man as a member of society. The fact that society is Christian in its faith and sympathies is important only as determining the form and spirit of those laws.

These then are limitations of the doctrine that Christianity is a part of the common law, and this is the meaning of the maxim of Lord Chief Justice Hale in its true and only sense, that the common law would not permit the essential truths of revealed religion to be ridiculed and reviled, or in other and simpler terms, that blasphemy was at common law an indictable offense.

#### HUMORS OF THE LAW.

A unique decision has been rendered by Judge George B. Sidener, of St. Louis, in the case where A. L. Simms was arrested on a charge of keeping a vicious dog. Little Willie Quinn declared the dog bit him. A witness in Simms' behalf declared that Willie had attempted to attach a can of rocks to the dog's tail. The judge said:

"Any dog has the legal, undeniable right to bite any man, woman or child who purposely, and with intent to disturb said dog's tranquility and peace of mind does attack, or cause to be attached, to said dog's tail can or other weight which will impede the progress of said animal. The dog which bites his persecutor in such a case is acting purely and honestly in self-defense, and is as justly immune from punishment as he man who shoots a burglar in defense of his own life and welfare."

"Discharged," said Judge Sidener. "I would bite, too, if I were a dog."

"This must be a good case you're on now to bring you way to New York," said the Broad street man encouragingly.

The lawyer from Slumpshire brightened.

"There's thirty dollars in it—on shares," said he. "A man down here owes my client that, and if he pays I get half. And I guess he's good for it."

"What! You come all this way on a thirty-dollar case?"

"You see, my client got kind of sick of sending bills, so he said he'd just as lief I'd come down and get it."

"Oh! A matter of principle with him. He pays your expenses, of course?"

"Well, no. He said he guessed it wouldn't hardly pay him to do that. He said I could take it if I liked, and he'd be satisfied with one-half if I got it. Well, y' see, the railroad runs right through the county seat—straight across the main street—and hasn't got any gates there to shut down when the trains go by. And the law is, they've got to have gates. Well, I went in and saw one of the big railroad men, and kind of called his attention to that, and suggested that I didn't care much whether the road went to the expense of putting in gates or not, but that I did care about getting to New York for nothing. So he was polite enough to fix it for me. I guess, if the man pays, I'll make enough for expenses while I'm here, and if I don't—why, I sold three fat hogs last week,—and, by gum, N'York's worth it."

Hays City, Kansas, some years ago had a young lawyer, Billy A——, fat and good-natured, but whose intellect can be gauged by his asking a witness on cross-examination "if there was any other loud talk he did not hear." Two men worked a farm near the town one summer on shares. After harvest they quarreled and one of them burned a large straw stack in which each had a half interest and was sued by his partner. Billy A——was for the defense and the town turned out to hear him.

As a matter of fact, there wasn't much of a trial, as the prisoner made no denial of the charge that he had set fire to the stack. But when "Billy" came to address the court, he advanced one of the most remarkable legal propositions the lawyers had ever heard. "Your Honor," he said, "we make no denial of the fact that we set fire to that straw stack, and we stand on the immortal principle handed down to us from Magna Charta that a man has the right to do what he will with his own. It is not denied that we owned half of that burned straw stack. Your Honor, we claim here that we set fire to only our own half, and unless it can be shown that with malice pretense we caused the fire to communicate with the other half we cannot be held for the destruction of the other man's property, which was a mere incident of the exercise of our own rights. Your Honor," and here "Billy," thundered into his peroration, "if a man can't burn his own straw stack, in the name of all that is holy, in the name of that star-eyed goddess whose smooth right arm bears aloft the scales of justice, whose straw stack can he burn?"—*Kansas City Journal*.

#### CORRESPONDENCE.

To the Editor of the Central Law Journal:

As a man and a citizen, I beg to thank you most sincerely for your able and patriotic discussion of the case of Callicott v. Allen, pending in the appellate court of this state. What a blessing it would be to the country if all the law journals of the country were inspired by a like sense of duty and patriotism.

Assuring you of my kindest regards and best wishes for yourself and the CENTRAL LAW JOURNAL,

I am, yours truly,

CHAS. L. WEDDING.

Evansville, Ind.

[The writer of the above letter refers to our editorial in our issue of Aug. 15, 55 Cent. L. J. 121].

#### WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**

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1. ADMIRALTY—Misjoinder Waived.—Where no exceptions are taken to a libel in which separate claims for salvage and towage services against different defendants are joined, objection to the misjoinder is waived.—*Merritt & Chapman Derrick & Wrecking Co. v. Chubb*, U. S. C. of App., Second Circuit, 113 Fed. Rep. 173.

2. ADULTERY—Evidence.—The disposition and presence together of the parties in equivocal circumstances held sufficient proof of adultery.—*Monteith v. State*, Wis., 89 N. W. Rep. 828.

3. ALTERATION OF INSTRUMENTS—"Gold" Inserted Before Dollars.—The unauthorized insertion of the word "gold" before the word "dollars" in a mortgage bond after its execution and delivery is a material alteration.—*Foxworthy v. Colby*, Neb., 89 N. W. Rep. 890.

4. APPEAL AND ERROR—Excessive Verdict.—Where no defects are shown on the face of the record, and there was no attempt to influence or improperly appeal to the jury, the appellate court will not reverse a verdict as excessive.—*Southern Ry. Co. v. Craig*, U. S. C. of App., Fourth Circuit, 113 Fed. Rep. 76.

5. APPEAL AND ERROR—Failure to File Briefs.—Under Rev. St. 1895, art. 1417, and Sup. Ct. Rules 29, 34 (20 S. W. Rep. viii), that the assignments of error present fundamental error is no excuse for failure to file briefs.—*Bowman v. Hoffman*, Tex., 67 S. W. Rep. 152.

6. APPEAL AND ERROR—General Exceptions.—A general exception to the charge of the court, covering many matters and issues, is insufficient to raise any question thereon which can be considered in an appellate court.—*Jack v. Mutual Reserve Fund Life Assn.*, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 49.

7. APPEAL AND ERROR—Harmless Error.—Where the court submitted one of plaintiff's theories of the case which there was no evidence to support, erroneous instructions thereon were without prejudice as to plaintiff.—*Straw v. Kromer*, Wis., 89 N. W. Rep. 821.

8. APPEAL AND ERROR—Instructions.—Defendants could not complain of erroneous instructions given at their request.—*Hunt v. Searcy*, Mo., 67 S. W. Rep. 206.

9. APPEAL AND ERROR—Misjoinder of Parties.—Where an answer pleaded a misjoinder of parties defendant and causes of action, but the question was not raised by demurrer or motion in arrest, it is deemed waived, and will not be considered on appeal.—*Needles v. Ford*, Mo., 67 S. W. Rep. 240.

10. APPEAL AND ERROR—New Trial.—A judgment will not be reversed for errors required to be assigned on a motion for new trial, unless it is alleged in the petition in error and shown by the record that the court erred

in overruling the motion.—*Gandy v. Cummins*, Neb., 85 N. W. Rep. 777.

11. **APPEAL AND ERROR—Questions of Fact.**—The concurrent decisions of two courts on questions of fact will be followed, unless clearly erroneous.—*Brainard v. Buck*, U. S. S. C., 22 Sup. Ct. Rep. 458.

12. **APPEAL AND ERROR—Remanded to Try a Single Point.**—Where the judgment in an action on a life policy is reversed, and cause remanded for retrial on a single point, the decision of the trial court on other points not being disturbed, such decision is the law of the case on the retrial.—*Hill v. Mutual Life Ins. Co.*, U. S. C. C., D. Wash., 113 Fed. Rep. 44.

13. **APPEAL AND ERROR—Statute of Frauds.**—An objection that a contract or guaranty is void, because not in writing, as required by the statute of frauds, cannot be raised for the first time in the supreme court.—*Meldrum v. Kenefick*, S. Dak., 80 N. W. Rep. 363.

14. **APPEAL AND ERROR—Sufficiency of the Evidence.**—Where the record on appeal contains all the facts, the court may review the sufficiency of the evidence to support a finding of fact, though such finding was not excepted to.—*Tillman v. Peoples*, Tex., 67 S. W. Rep. 201.

15. **APPEAL AND ERROR—Verdict Given on Insufficient Evidence.**—Where the evidence on an appeal was wholly insufficient to support the verdict appealed from, judgment will be rendered for the appellant in the appellate court.—*City of Galveston v. Brown*, Tex., 67 S. W. Rep. 156.

16. **APPEAL AND ERROR—Waiver of Defenses.**—Where defendant failed to perfect an appeal from a judgment against him in favor of a co defendant, he could not assign error against such co defendant on an appeal by the plaintiff against them both.—*National Bank of Cleburne v. Carper*, Tex., 67 S. W. Rep. 188.

17. **APPEARANCE—Witness.**—An appearance of a party to testify as a witness is not an appearance to the action.—*Commercial State Bank v. Rowley*, Neb., 89 N. W. Rep. 765.

18. **ASSAULT AND BATTERY—Information.**—That an information for an aggravated assault couples in one count the different phases of the crime does not vitiate it.—*Black v. State*, Tex., 67 S. W. Rep. 113.

19. **ASSAULT AND BATTERY—Unchastity of Prosecutrix.**—In a prosecution for indecent assault, held error to refuse defendant's evidence that prosecutrix before the assault confessed to him to carnal intercourse with other men.—*Wilson v. State*, Tex., 67 S. W. Rep. 106.

20. **ASSIGNMENTS FOR BENEFIT OF CREDITORS**—Assignee Continuing the Business.—The heirs of an assignor for creditors, whose assignee had continued the business after payment of debts by mutual consent, held estopped to charge the assignee with losses sustained by the business in depressed times.—*Quimby v. Uhl*, Mich., 89 N. W. Rep. 722.

21. **ASSIGNMENTS FOR BENEFIT OF CREDITORS—Estoppel to Deny Assignee's Authority.**—Where an assignor for benefit of creditors under a common-law assignment and the creditors consent to the assignee's continuance of the business, they are estopped to deny his authority.—*Quimby v. Uhl*, Mich., 89 N. W. Rep. 722.

22. **ASSIGNMENT OF PATENT**—Re-execution of Instrument.—Under the general equitable power to decree a re-execution of a lost instrument, a court of equity has power to compel the re-execution of an instrument which has been wrongfully mutilated.—*Niles v. Graham*, Mass., 62 N. E. Rep. 985.

23. **BAIL—Jurisdiction.**—A federal court held to have no jurisdiction to entertain motion to admit to bail, where appeal has been taken from its decision discharging writ of *habeas corpus*, and pending it the prisoner has been remanded to the custody of state officers, as authorized by supreme court rule 34.—*In re Bissert*, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 12.

24. **BAIL—Liability on Bond.**—Where a judgment debtor, on being arrested, gave a bond conditioned to appear on a certain day in supplementary proceedings,

and did appear, and the case was continued, his failure to appear at the continuance was not a breach.—*Straw v. Kromer*, Wis., 89 N. W. Rep. 821.

25. **BANKRUPTCY—Discharge.**—Where objections are interposed to the discharge of a bankrupt, and the discharge is refused on facts found by a referee, to whose findings no objections are filed, the findings are conclusive, and the cause will not be reheard on allegations that they may be disposed if another reference is made.—*In re Royal*, U. S. D. C., E. D. N. Car., 113 Fed. Rep. 140.

26. **BANKRUPTCY—Exemptions.**—Where a bankrupt files a schedule claiming exemptions, as authorized by Bankr. Act § 7, subd. 8, and the assignee files his account as required by section 47, and in conformity with general order No. 17 (18 Sup. Ct. Rep. vi.), the question of exemptions may be considered by the court without being specially pleaded.—*McGahan v. Anderson*, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 115.

27. **BANKRUPTCY—Findings of Referee.**—Where no exceptions to the report of a referee in bankruptcy are filed as provided by equity rule 83, the findings of facts are conclusive.—*In re Carver*, U. S. D. C., E. D. N. Car., 113 Fed. Rep. 138.

28. **BANKRUPTCY—Life Insurance.**—Policies on a husband's life, payable to his wife if she survive him, otherwise to his personal representatives, are not exempt under Laws Wash. 1895, p. 336, and Bankr. Act § 6, on their both being adjudged bankrupt, but pass to their trustee under section 70a of the bankrupt act.—*In re Holden*, U. S. C. C. of App., Ninth Circuit, 113 Fed. Rep. 141.

29. **BANKRUPTCY—Mortgage Lien.**—Where mortgaged property owned by a bankrupt is in the custody of the bankruptcy court, and the legal title thereto is lawfully held by the trustee in bankruptcy as a part of the bankrupt's estate, the federal district court has jurisdiction to hear and determine a question as to the validity and amount of the mortgage lien.—*In re Kellogg*, U. S. D. C., W. D. N. Y., 113 Fed. Rep. 120.

30. **BANKRUPTCY—Partnership.**—Validity of a mortgage given by partnership is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone.—*McNair v. McIntyre*, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 113.

31. **BANKRUPTCY—Stock Broker's Customer.**—A customer of a bankrupt stock broker is a creditor, within Bankr. Act, § 37g, and his claims cannot be allowed, unless preferences received by him are restored.—*In re Gaylord*, U. S. D. C., E. D. Mo., 113 Fed. Rep. 131.

32. **BANKRUPTCY—Summary Proceedings.**—Under Bankr. Act, § 2, subd. 3, the receiver of a bankrupt estate held entitled to restrain summary proceedings in state court by lessor of bankrupt.—*In re Kleinhans*, U. S. D. C., W. D. N. Y., 113 Fed. Rep. 107.

33. **BANKRUPTCY—Surrendering Preferences.**—If payment received by creditor without knowledge of insolvency need not be surrendered before proof, not being a preference within the bankruptcy act, because the result of the whole transactions increases the net indebtedness, the same payment received with knowledge of insolvency is not a preference and need not be surrendered.—*In re Henry C. King Co.*, U. S. D. C., D. Mass., 113 Fed. Rep. 110.

34. **BANKS AND BANKING—Estoppel.**—Where the president and cashier of a bank collects money and deposits it in the bank to the credit of a customer, the bank cannot, to escape liability for the fraud of such president, deny his authority to represent it.—*Citizens' Bank v. Fromholz*, Neb., 89 N. W. Rep. 775.

35. **BANKS AND BANKING—Insolvent National Bank.**—The comptroller of the currency held authorized to make a second assessment on the shareholders of an insolvent national bank, where the first assessment proved insufficient, by Rev. St. U. S. § 5294.—*Studebaker v. Perry*, U. S. S. C., 22 Sup. Ct. Rep. 463.

36. **BANKS AND BANKING—Usury.**—Twice the amount of the entire interest paid is the measure of recovery

from a national bank for collecting usury under Rev. St. U. S. § 5198.—First Nat. Bank v. Watt, U. S. S. C., 22 Sup. Ct. Rep. 457.

87. **BENEFICIAL ASSOCIATIONS—Must Conform to By-Laws.**—Where a sick member is unable to keep up his assessments, where the by-laws so provide, he must appear before the council and make a statement required by the by-laws to retain his membership.—Field v. National Council of Knights and Ladies of Security, Neb., 89 N. W. Rep. 778.

88. **BILLS AND NOTES—Effect of Usurious Extension.**—Where a debtor executes a note for a lawful rate of interest, and at maturity contracts for extension at a usurious rate, the lender is restricted to the amount due at the time of making the usurious contract.—Chicago Lumber Co. v. Bancroft, Neb., 89 N. W. Rep. 780.

89. **BILLS AND NOTES—Proof of Payment.**—If the maker pays a negotiable note to one who does not produce it, he has the burden of showing that such party was the owner or authorized to receive payment.—Coddington Sav. Bank v. Anderson, Neb., 89 N. W. Rep. 787.

40. **BILLS AND NOTES—Purchaser for Value.**—A purchaser of a note for valuable consideration may enforce its collection, though there was no indorsement or transfer of it.—Lyman v. Warner, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 87.

41. **BOUNDARIES—Land Below High-Water Mark.**—The inshore boundary of a grant of a strip of land below high-water mark, 400 feet wide, changes with the high-water mark; the shifting of the shore being from natural causes.—De Lancey v. Wellbrock, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 103.

42. **BUILDING AND LOAN ASSOCIATIONS—Law Which Governs.**—Where a loan is made by a building and loan association of one state to a member residing in another state, and secured by mortgage on his real estate therein, all payments to be made at the home office of the association, the contract is governed by the laws of the former state.—United States Savings & Loan Co. v. Harris, U. S. C. C., E. D. Ky., 113 Fed. Rep. 27.

43. **CARRIERS—Limitation of Liability.**—A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire, when he was chargeable with knowledge that the bill contained such clause and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.—Charnock v. Texas & P. Ry. Co., U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 92.

44. **CARRIERS—Trespasser.**—A railroad company is not liable for an injury to a trespasser on a train, though it occurred through gross negligence of its employees, where such employees had no notice of his presence on the train.—Crawleigh v. Galveston, H. & S. A. Ry. Co., Tex., 67 S. W. Rep. 149.

45. **CARRIERS—Vis Major.**—A railway company is not liable for conversion of wheat in its possession for transportation, which was destroyed by an unusual storm, though there was delay in the transportation and delivery.—Gulf, C. & S. F. Ry. Co. v. Darby, Tex., 67 S. W. Rep. 129.

46. **CEMETERIES—Sale.**—Sale of cemetery land by board of directors without consent of stockholders or of those who had interred their dead in the cemetery held void, though made to satisfy a purchase money lien, and cemetery corporation is liable to refund.—Woodland Cemetery Co. v. Ellison, Ky., 67 S. W. Rep. 14.

47. **COMMERCE—Foreign Corporation.**—The question whether the business in which a foreign corporation is engaged within the state is interstate commerce is one of fact.—Commonwealth v. Read Phosphate Co., Ky., 67 S. W. Rep. 45.

48. **CONSTITUTIONAL LAW—Class Legislation as to Enjoyment of Public Waters.**—A law treating some persons within the state differently from others as to the enjoyment of public waters is a violation of the fourteenth amendment of the constitution of the United States.—Rossmiller v. State, Wis., 89 N. W. Rep. 839.

49. **CONSTITUTIONAL LAW—Due Process of Law.**—Act May 17, 1899, prohibiting receipt by officers of association of dues after it is insolvent, does not take property without due process of law.—State v. Missouri Guarantee Sav. & Bldg. Assn., Mo., 67 S. W. Rep. 215.

50. **CONSTITUTIONAL LAW—Inquisition in Lunacy.**—Rev. St. 1845, p. 533, ch. 85, § 3, relating to inquisitions in lunacy, and not requiring notice to the person alleged to be insane, was contrary to the constitutional provision that no person shall be deprived of life, liberty or property without due process of law.—Hunt v. Searcy, Mo., 67 S. W. Rep. 206.

51. **CONSTITUTIONAL LAW—Reduction of Car Fare.**—An ordinance, adopted under legislative authority providing that the rate of fare of a street railway company shall not exceed five cents, gives the company, when accepted, a contract right to charge that rate, which cannot be reduced by the city without the consent of the company.—City of Detroit v. Detroit Citizens' St. Ry. Co., U. S. S. C., 22 Sup. Ct. Rep. 410.

52. **CONSTITUTIONAL LAW—Taking Property for Private Purposes.**—V. L. 1900, No. 142, requiring a railroad company which has purchased property of another corporation at a mortgage foreclosure sale to pay a judgment against the latter, held an attempt to require private property to be applied to private purposes, in violation of Const. Vt. ch. 1, arts. 1, 2, 9.—Woodward v. Central Vermont Ry. Co., Mass., 62 N. E. Rep. 1051.

53. **CONTRACTS—Work on Railroad—Stipulation in a contract for work on a railroad as to measurement of work performed held nothing more than a provision for a means of determining the amount of the work, so that fraud or mistake of the party making the measurement is a ground for relief.**—Illinois Cent. R. Co. v. Manion, Ky., 67 S. W. Rep. 40.

54. **CONTRIBUTION—Action on a Note.**—Where a note signed by principal and sureties was renewed by the sureties alone, they became joint principals, and upon the payment by one of them he was entitled to contribution from his co-obligors.—Graziani v. Hall, Ky., 67 S. W. Rep. 9.

55. **COUNTIES—Issuing Bonds.**—After a long acquiescence in the exercise of a power of a county to issue bonds, and after they have passed into the hands of purchasers for value, the bonds will be held valid.—Washington County v. David, Neb., 89 N. W. Rep. 737.

56. **COURTS—Ancillary Jurisdiction.**—Where a circuit court has actually seized realty in foreclosure proceedings, it has ancillary jurisdiction of a suit by a third person to enjoin its sale, regardless of the citizenship of the parties.—Davis v. Martin, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 6.

57. **COURTS—Certiorari.**—A writ of *certiorari* to perfect the record on an appeal from the circuit court of appeals by supplying alleged omissions does not bring the case before the United States Supreme Court, nor add any support to the appeal.—Huguley Mfg. Co. v. Gleton Cotton Mills, U. S. S. C., 22 Sup. Ct. Rep. 452.

58. **COVENANTS—Conveyance of Water Right.**—Where a deed granting 875 square inches of water, subject to a prior grant of 600 inches, contained an absolute covenant of seisin and warranty of 875 inches, the grantee took subject to the exception.—Koch v. Hustis, Wis., 89 N. W. Rep. 838.

59. **CRIMINAL TRIAL—Improper Argument.**—In a prosecution for murder, held error for the district attorney in his closing argument to state that there was a conspiracy to kill, that he knew what he was talking about, and that he did not call a witness to prove it because he could not contradict her.—Rutherford v. State, Tex., 67 S. W. Rep. 100.

60. **CRIMINAL TRIAL—Remark by Trial Court.**—A remark of the trial court in prosecution for burglary held prejudicial error, not cured by subsequent instruction.—Beason v. State, Tex., 67 S. W. Rep. 96.

61. **CUSTOMS DUTIES—Laws of Russia.**—The laws o

Russia bestow a grant upon the exportation of so-called "free sugar," by exempting such sugar from the excise tax which it would be required to pay if sold in the domestic market, and by granting a certificate of exportation which is transferable and has a substantial market value; and sugar imported from that country is subject to the countervailing duty required by Tariff Act 1897, § 5.—*Downs v. United States*, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 144.

62. DAMAGES—Breach of Contract.—Damages based on the estimated expense incurred and losses of profits sustained held not recoverable in an action for breach of a contract to complete and deliver certain vessels within a specified time, though the purpose for which they were intended was known by the parties. — *De Ford v. Maryland Steel Co.*, U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 72.

63. EMINENT DOMAIN — Authority of Railroad Company.—Where a railroad company exceeds its power of condemnation in changing the grade of a street, the remedy for a resulting injury is an action of tort, and it is not estopped by its own wrong to set up that defense to a petition for compensation. — *Peabody v. Boston & P. R. Corp.*, Mass., 62 N. E. Rep. 1047.

64. EQUITY—Amendment.—An amendment to a bill in equity held not to set forth a new cause of action, so as to forbid its allowance, because the reasons for relief are stated more fully and differently from those in the original bill. — *Brainard v. Buck*, U. S. S. C., 22 Sup. Ct. Rep. 458.

65. EQUITY—Improper Cross-Examination. — Where in the taking of testimony for use at a trial, irrelevant or otherwise, improper cross-examination is indulged in, the question should be answered, and the error dealt with as a question of costs.—*Brown v. Worster*, U. S. C. C., E. D. Penn., 113 Fed. Rep. 20.

66. EQUITY—Reference for Accounting.—A complainant is not entitled to a reference to take an accounting until he has established his right to recover by evidence, where the allegations of the bill are denied in the answer.—*Columbia Equipment Co. v. Mercantile Trust & Deposit Co.*, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 23.

67. ESTOPPEL—Innocent Purchaser.—One who allowed an agent to invest his money in a mortgage in the agent's name, and to acquire the legal title, held not entitled to enforce the mortgage as against innocent purchasers at a sale under a judgment against the agent.—*Persons v. Van Tassal*, S. Dak., 89 N. W. Rep. 861.

68. EVIDENCE—Consideration.—Where the consideration expressed in a deed is a valuable one, and the title comes by purchase, parol evidence is inadmissible to show that in fact the title came by gift, so as to affect the rule of descent. — *Groves v. Groves*, Ohio, 62 N. E. Rep. 1044.

69. EVIDENCE—Failure to Produce Material Witness.—Where a party has it in his power to produce a material witness, and fails to do so, a presumption arises that the testimony would be unfavorable to him. — *In re Kellogg*, U. S. D. C., W. D. N. Y., 113 Fed. Rep. 120.

70. EVIDENCE—Pleading.—Sustaining demurrer to certain paragraphs of answer is not error, where any evidence admissible thereunder is also admissible under the remaining paragraphs. — *Musselman v. Hays*, Ind., 62 N. E. Rep. 1022.

71. EVIDENCE—Question of Fact.—Witness cannot give his opinion whether it is dangerous to plate glass under an awning to leave the awning down during a storm, this being a question for the jury. — *Miles v. Stanke*, Wis., 89 N. W. Rep. 833.

72. EXECUTORS AND ADMINISTRATORS — Breach of Bond.—Failure of administrator to comply with decree to pay over the money found due the estate on his final accounting is a breach of the conditions of his bond.—*Mortenson v. Berghold*, Neb., 89 N. W. Rep. 742.

73. EXECUTORS AND ADMINISTRATORS — Right to Purchase Claim.—Where the defendant in an action by an

administrator on a claim sold and assigned to the latter has no interest in the estate, it is no defense that the administrator had no right to purchase the claim.—*Brossard v. Williams*, Wis., 89 N. W. Rep. 832.

74. EXECUTORS AND ADMINISTRATORS—Sale of Realty.—Under the law of Louisiana, as settled by the decisions of its supreme court, a sale of real property of a decedent to pay debts of the succession, under a warrant duly issued therefor by the probate court having jurisdiction, extinguishes mortgages given by the deceased on the property, leaving mortgage creditors to look to the proceeds in the hands of the administrator. — *Davis v. Martin*, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 6.

75. EXTRADITION — Treaty With Prussia. — A forgery committed in Prussia is an offense extraditable under the treaty of the United States with Prussia, when the crime is committed in violation of a law of the German empire recognized in Prussia. — *Terlinden v. Ames*, U. S. S. C., 22 Sup. Ct. Rep. 484.

76. FEDERAL COURTS—Constitutional Question.—A decision of a federal question in denying a rehearing is sufficient to give jurisdiction on writ of error to a state court from the Supreme Court of the United States, though the question was first raised on such motion.—*Missouri, K. & T. Ry. Co. v. Elliott*, U. S. S. C., 22 Sup. Ct. Rep. 446.

77. FEDERAL COURTS — Following State Decisions. — Under Rev. St. U. S. § 721, a federal court is not bound, against its own judgment, to follow the decisions of the highest court of the state in which it is sitting as to what law governs a contract of loan between a building and loan association of one state and a member residing in another state.—*United States Savings & Loan Co. v. Harris*, U. S. C. C., E. D. Ky., 113 Fed. Rep. 27.

78. FIRE INSURANCE — Partial Loss. — Under Ky. St. § 700, a provision in a policy on real property, requiring insured to maintain insurance to the extent of at least 80 per cent. of the actual cash value of the property and providing that in the event he fails to do so he shall be a co-insurer to the extent of such deficit, is void.—*Sachs v. London & L. Fire Ins. Co.*, Ky., 67 S. W. Rep. 23.

79. GAMING—Invalid Contract.—Transactions between a principal and his broker in the purchase of securities held to show that the principal understood that the securities were actually bought and sold by the broker, and hence that the contract between principal and broker was not invalid, under St. 1890, ch. 457, § 2.—*Rice v. Winslow*, Mass., 62 N. E. Rep. 1057.

80. GARNISHMENT — Action on Check. — Where an erroneous judgment has been entered against a garnishee, as acceptor of a draft, in a proceeding against the drawer, he should appeal therefrom, since he would remain liable to the indorsee if he paid the judgment.—*Commercial State Bank v. Rowley*, Neb., 89 N. W. Rep. 765.

81. HIGHWAYS — Liability of Corporate Authority.—Corporate authorities are individually liable for the cutting of culverts and drains in the construction of a highway or turnpike, so as to result in an unusual and unnatural collection of water, which is discharged upon the land of a private individual to his damage. — *Breen v. Hyde*, Mich., 89 N. W. Rep. 732.

82. HIGHWAYS—Prescription.—Prescriptive right to a public highway cannot be acquired, where the roadway is through the inclosed premises of the owner, and is changed from time to time to suit his convenience, and control is asserted by the public authorities.—*Hill v. McGinnis*, Neb., 89 N. W. Rep. 783.

83. HOMESTEAD — Abandonment. — A wife cannot be deprived of her homestead right because her husband leaves the homestead without an intent to return, unless she participated in such intent. — *Blumer v. Albright*, Neb., 89 N. W. Rep. 809.

84. HOMICIDE—Dying Declaration.—Deceased having, at a time when he stated that he could not live over an hour, confirmed a statement previously made by him

the statement was thereby rendered admissible in a homicide prosecution as his dying declaration.—*Smith v Commonwealth, Ky.*, 67 S. W. Rep. 62.

85. **HOMICIDE—Evidence.**—Defendant, convicted of murder in the second degree, could not complain that the conviction was not sustained by the evidence, basing such contention on the theory of the prosecution that the offense was murder in the first degree.—*Eckert v. State, Wis.*, 89 N. W. Rep. 826.

86. **HOMICIDE—Evidence.**—Letters found on deceased, showing improper relations between deceased and defendant's sister, held admissible for defendant in a murder prosecution.—*McAnear v. State, Tex.*, 67 S. W. Rep. 117.

87. **HOMICIDE—Self-Defense.**—While a party attacked is not bound to retreat, yet, if he does actually retreat, the law of self-defense will not permit him to arm himself and return to the attack.—*Bowles v. State, Tex.*, 67 S. W. Rep. 103.

88. **HUSBAND AND WIFE—Separation from Husband.**—That a wife has lived apart from her husband for several years is not ground for refusing to her an allowance out of his personal estate, under Pub. St. ch. 135, § 2, on his decease.—*Welch v. Welch, Mass.*, 62 N. E. Rep. 982.

89. **HUSBAND AND WIFE—Widow to Prosecute Suit.**—Where, pending an action for personal injuries to a married woman, her husband dies intestate, the widow may prosecute the suit in her own name as survivor, where there was no administration upon the husband's estate nor any necessity therefor.—*St. Louis S. W. Ry Co. of Texas v. Carville, Tex.*, 67 S. W. Rep. 160.

90. **INDIANS—Alienation of Land.**—Consent of secretary of the interior to a conveyance by an Indian patentee, whose patent prohibited alienation by him or his heirs without such consent may be given after the death of the Indian grantor, and relate back to the date of the conveyance.—*Lykins v. McGrath, U. S. S. C.*, 22 Sup. Ct. Rep. 450.

91. **INTERNAL REVENUE—Passage of Legacies.**—Legacies to a testator's children, named in his will, held to pass, within the meaning of the revenue act of 1895, to them by his will, notwithstanding a power therein given to testator's wife to apportion by her will the respective shares to be received by the children.—*Fidelity Trust Co. v. McClain, U. S. C. C.*, E. D. Pa., 113 Fed. Rep. 152.

92. **INTOXICATING LIQUORS—Illegal Sale.**—No action can be maintained on a contract for the sale of liquors, where such sale is prohibited by law.—*P. Schoenhofen Brewing Co. v. Whipple, Neb.*, 89 N. W. Rep. 751.

93. **JUDGMENT—Costs.**—Where plaintiff in an action for personal injuries takes a nonsuit, a judgment against him for costs is proper.—*Thomason v. Southern Ry. Co., U. S. C. C. of App.*, Fourth Circuit, 113 Fed. Rep. 80.

94. **JUDGMENT—Nominal Damages.**—A judgment for nominal damages for breach of a contract is not necessarily a bar to a decree for specific performance, though a recovery of substantial damages might be.—*Slaughter v. La Compagnie Francaise Des Cables Telegraphiques, U. S. C. C.*, S. D. N. Y., 113 Fed. Rep. 21.

95. **JUDGMENT—Unauthorized Appearance.**—A decree entered against persons not served with process, for whom an unauthorized appearance has been entered, will be reversed.—*Hatfield v. King, U. S. S. C.*, 22 Sup. Ct. Rep. 477.

96. **LANDLORD AND TENANT—Right to Chattels.**—Where a landlord enters under a lease on default, he succeeds to such title in the machinery placed on the premises, which were to be forfeited to him on default, as the lessee himself.—*Webster v. Bates Mach. Co., Neb.*, 89 N. W. 789.

97. **LICENSES—Steam Laundries.**—A city held not to have power, under Acts 1893, p. 89, § 107, to impose a license tax on agents of local steam laundries.—*City of Independence v. Cleveland, Mo.*, 67 S. W. Rep. 216.

98. **LIFE INSURANCE—Computation of Paid-Up Policy.**—Rule stated for the computation of the period of paid-up insurance under the provisions of a policy.—*Crutchfield v. Union Cent. Life Ins. Co., Ky.*, 67 S. W. Rep. 8.

99. **LIFE INSURANCE—Contract Conditioned on Acceptance by the Company.**—A receipt given by an agent of a life insurance company for the first premium on a policy cannot be held to have effected a contract of insurance, contrary to a provision of the application, that no contract should be created unless the application was accepted by the company.—*Pace v. Provident Savings Life Assur. Soc., U. S. C. C. of App.*, Fifth Circuit, 113 Fed. Rep. 13.

100. **LIFE INSURANCE—Crediting Earnings on Premium.**—The company having elected to credit the dividend on the premium, as shown by a letter written to insured after the premium was due, the life policy continued in force for the length of time for which the dividend paid the premium.—*Etna Life Ins. Co. v. Hartley, Ky.*, 67 S. W. Rep. 15.

101. **LIFE INSURANCE—Proof of Murder in an Action on Policy.**—In an action on a life insurance policy, a defense that the plaintiff aided and abetted, or procured, another to murder the insured, need not be proved beyond a reasonable doubt, but only by a preponderance of the evidence.—*Jack v. Mutual Reserve Fund Life Assn., U. S. C. C. of App.*, Fifth Circuit, 113 Fed. Rep. 49.

102. **LIFE INSURANCE—Representations.**—Statements in an application for insurance will be held to be mere representations, where to hold them warranties would defeat the intent of the parties, though it is stipulated in the policy that they are warranties.—*Royal Neighbors of America v. Wallace, Neb.*, 89 N. W. Rep. 758.

103. **LIFE INSURANCE—Waiver of Forfeiture by Agent.**—The state agent of a life insurance company held to have no authority to waive a forfeiture against provisions of policy.—*Crutchfield v. Union Cent. Life Ins. Co., Ky.*, 67 S. W. Rep. 67.

104. **LIMITATION OF ACTIONS—Administrator's Final Accounting.**—Limitations do not run against an action on a bond of an administrator for failure to pay over the money on his final accounting till decree entered.—*Mortenson v. Bergthold, Neb.*, 89 N. W. Rep. 742.

105. **LIMITATION OF ACTIONS—Amendment of Petition.**—An amendment of the petition in a damage suit, after a judgment therein had been reversed on account of misjoinder of defendants, by leaving out the wrongfully joined defendant, held not to constitute a new cause of action, so as to make the statute of limitation apply.—*Texas Midland R. R. v. Cardwell, Tex.*, 67 S. W. Rep. 144.

106. **LIMITATION OF ACTIONS—Community Property.**—Where plaintiffs' father died, leaving community personality of which their mother had possession until her death, when her second husband took possession, plaintiffs could not recover the value of such property unless they sued within two years after knowledge of their rights.—*Gerfers v. Mecke, Tex.*, 67 S. W. Rep. 144.

107. **LIMITATION OF ACTIONS—Computation of Period.**—Code N. Car. § 162, providing for the deduction of the time of defendant's absence from the state in computing the period of limitations, held not applicable to a suit against a foreign railroad corporation continuously doing business within the state.—*Southern Ry. Co. v. Mayes, U. S. C. C. of App.*, Fourth Circuit, 113 Fed. Rep. 84.

108. **LIMITATION OF ACTIONS—Contract to Convey or Devise.**—In a proceeding under Pub. St. ch. 136, §§ 6, 7, against an estate of which claimant is administrator, to recover for money advanced on an oral agreement that, in return, the testate would convey or devise her house to him, which she failed to do, limitations held not to commence to run against the claim until her death.—*Morrissey v. Morrissey, Mass.*, 62 N. E. Rep. 972.

109. **LIMITATION OF ACTIONS—Husband's Sale of Wife's Property.**—Where plaintiff's husband, acting under her power of attorney, sold and conveyed her land in 1872, and died in 1889, and she did not sue to recover the land

from such purchaser, who had had continual possession, until four years after the act of 1895 made limitations applicable to married women, her action was barred.—*Williams v. Bradley*, Tex., 67 S. W. Rep. 170.

110. **MANDAMUS**—Statutory Remedy.—Rev. Laws, ch. 11, § 421, gives a statutory remedy for violations of the caucus and election laws, so that *mandamus* will not lie against officers of a caucus of a political party.—*Perry v. Hull*, Mass., 62 N. E. Rep. 962.

111. **MASTER AND SERVANT**—Assumption of Risk.—A promise by a master to furnish light in a place where a servant is required to work, which is dangerous for the want thereof, does not prevent the assumption of risk by the servant in continuing to work therein after the master has had a reasonable time to supply the lights.—*Hillie v. Hettich*, Tex., 67 S. W. Rep. 90.

112. **MASTER AND SERVANT**—Employer's Liability Act.—The employers' liability act (Acts 1893, p. 294) held not to create a right of action for an injury sustained in another state through a fellow-servant's negligence.—*Baltimore & O. S. W. Ry. Co. v. Jones*, Ind., 62 N. E. Rep. 994.

113. **MASTER AND SERVANT**—Employers' Liability Act Construed.—The provision of the Massachusetts employers' liability act, making an employer liable for an injury to an employee caused by the negligence of one whose "principal duty is that of superintendence," construed.—*Canney v. Walkeine*, U. S. C. C. of App., First Circuit, 113 Fed. Rep. 66.

114. **MASTER AND SERVANT**—Fellow-Servants.—The court will presume that the common-law rule preventing a recovery from a master for injuries sustained through the negligence of fellow-servants obtains in another state.—*Baltimore & O. S. W. Ry. Co. v. Jones*, Ind., 62 N. E. Rep. 994.

115. **MASTER AND SERVANT**—Hand Cars.—Under Sayles' Ann. Civ. St. art. 4560f, an instruction that if the brake, which suddenly stopped the hand car which plaintiff's intestate was assisting to operate, whereby he was thrown off and killed, was not applied under the direction of the foreman, then plaintiff cannot recover, was error.—*Perez v. San Antonio & A. P. Ry. Co.*, Tex., 67 S. W. Rep. 137.

116. **MASTER AND SERVANT**—Negligence.—Party employing independent contractor to connect private building with sewer held liable for latter's negligence in failing to properly guard the excavation.—*McCarrier v. Hollister*, S. Dak., 89 N. W. Rep. 862.

117. **MASTER AND SERVANT**—Obvious Defect.—Where a servant sues for injuries resulting from his master's failure to furnish him a safe place to work, his want of knowledge of the defect or dangerous condition complained of must be affirmatively alleged.—*Ohio Valley Coffin Co. v. Goble*, Ind., 62 N. E. Rep. 1025.

118. **MASTER AND SERVANT**—Personal Injuries.—In an action by a servant for injuries by the breaking of a belt, it was error to refuse to allow the employer to show that it had adopted the most approved fasteners for the belt.—*Bering Mfg. Co. v. Peterson*, Tex., 67 S. W. Rep. 133.

119. **MASTER AND SERVANT**—Pleading.—The defense that a servant's injuries were caused by the negligence of his fellow-servants is admissible under a general denial.—*Kaminski v. Tudor Iron Works*, Mo., 67 S. W. Rep. 221.

120. **MASTER AND SERVANT**—Statement as to Service.—An action will not lie by a discharged railroad employee against the company for refusal to furnish him with a clearance, though he may have been unable to obtain other employment thereby.—*New York, C. & St. L. R. Co. v. Schaffer*, Ohio, 62 N. E. Rep. 1036.

121. **MASTER AND SERVANT**—Unfitness of Servant.—In an action against the master because of the absconding of a servant with property pledged by plaintiff with the master, evidence held sufficient to charge master with knowledge of the servant's character.—*Carson v. Canning*, Mass., 62 N. E. Rep. 964.

122. **MECHANICS' LIENS**—Principal and Agent.—Though defendant has appropriated to his own use machinery in his manufacturing plant, purchased from plaintiff by one whom he had put in charge of the property as his agent, held error to render a personal judgment against him for the value thereof, plaintiff being entitled only to a lien thereon.—*Lingenfelter v. Henry Vogt Mach. Co.*, Ky., 67 S. W. Rep. 8.

123. **MONOPOLIES**—Exempting Agriculturists from Anti-Trust Laws.—An elimination of the unconstitutional portions of the Illinois trust act of June 20, 1893, exempting agriculturists and live stock dealers from the provisions prohibiting combinations in restraint of trade, cannot be made without contravening the legislative intent, and therefore the whole act is invalid.—*Connolly v. Union Sewer Pipe Co.*, U. S. S. C., 22 Sup. Ct. Rep. 431.

124. **MORTGAGES**—Absolute Deed in Form.—Where the uncontradicted evidence shows that a deed absolute in form was in fact a mortgage, that the debt had been discharged, and the deed surrendered, a finding that the title vested in the grantee absolutely and descended to her heirs cannot be sustained.—*Decker v. Decker*, Neb., 89 N. W. Rep. 735.

125. **MORTGAGES**—Certificate as to Taxes.—Where the county treasurer furnishes two certificates of the amount of taxes due on land to be sold under foreclosure, the latter certificate will be presumed correct.—*Wright v. Patrick*, Neb., 89 N. W. Rep. 746.

126. **MORTGAGES**—Entry by Mortgagee.—In an action to foreclose, where the mortgagee has taken possession and a decree has been entered, all the parties are concluded as to the rents and profits received by the mortgagee while in possession.—*Felino v. K. S. Newcomb Lumber Co.*, Neb., 89 N. W. Rep. 755.

127. **MORTGAGES**—What Law Governs.—The estate of a mortgagor in mortgaged premises situated in New York must follow the rules laid down by the state tribunal.—*In re Kellogg*, U. S. D. C., W. D. N. Y., 113 Fed. Rep. 120.

128. **MUNICIPAL CORPORATIONS**—Assessment for Improvements.—Misdescription of the lands taken in proceedings to make a local improvement constitutes no defense, on enforcing the assessment, as to one whose lands were not taken.—*Goodrich v. City of Detroit*, U. S. S. C., 22 Sup. Ct. Rep. 397.

129. **MUNICIPAL CORPORATIONS**—Assessment for Improvements.—Under Comp. St. 1893, ch. 12a, § 78, to sustain a levy for a special assessment according to the front-foot rule, it must affirmatively appear that the council, sitting as a board of equalization, found that the benefits were equal and uniform as to all the lots and the tracts to be affected by the proposed improvement.—*John v. Connell*, Neb., 89 N. W. Rep. 806.

130. **NAVIGABLE WATERS**—Ice.—The title to the beds of navigable lakes within the state is vested in the state in trust for the people, but it has no proprietary right in the water or ice which forms therein which it can deal in by sale or otherwise.—*Rossmiller v. State*, Wis., 89 N. W. Rep. 839.

131. **NAVIGABLE WATER**—Land Below High-Water Mark.—The state having granted in fee a strip of land under water, extending out 400 feet from high-water mark, cannot thereafter give another the right to erect a public dock thereon.—*De Lancey v. Wellbrock*, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 103.

132. **NEGLECT**—Railroad Turntables.—The maintenance of railroad turntables is not *per se* negligence, though the manner of maintaining them may be negligence.—*Thomason v. Southern Ry. Co.*, U. S. C. C. of App. Fourth Circuit, 113 Fed. Rep. 80.

133. **NEWSPAPERS**—Affidavit of Publication.—Statement in printer's affidavit of publication of notice that first insertion was April 30th, and the last May 4th of the same year held to control statement that publication was for three weeks.—*Flood v. Kerwin*, Wis., 89 N. W. Rep. 945.

131. **NUISANCE**—Public Nuisance.—In a suit by a town to restrain a manufacturing company from carrying on a certain business, plaintiff could not be granted relief on the ground that the business was a public nuisance, without allegation of special damages.—*Inhabitants of Winthrop v. New England Chocolate Co.*, Mass., 62 N. E. Rep. 969.

135. **PARTNERSHIP**—Notice of Dissolution.—That no notice of dissolution of a partnership was given held not to make a partner liable on a note given in the firm name by another partner four years after its dissolution.—*Puritan Trust Co. v. Coffey*, Mass., 62 N. E. Rep. 970.

136. **PATENTS**—Adapting Device to New Use.—The transfer of a device from one art to another does not, amount to invention, where it performs the same function in both, without any change of form to adapt it to the new use.—*Standard Caster & Wheel Co. v. Caster Socket Co.*, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 162.

137. **PAYMENT**—Mistake.—Allegations that certain payments as interest were in excess of the amount due and without knowledge of that fact, held to sufficiently indicate a payment by mistake.—*Garrison v. Murphy*, Neb., 89 N. W. Rep. 766.

138. **PLEADING**—Demurrer.—Where, in a suit to cancel a mortgage, it is filed as an exhibit, it cannot be considered on a demurrer to the complaint in determining the sufficiency of the pleading.—*Marley v. National Building, Loan & Savings Assn.* No. 2, Ind., 62 N. E. Rep. 1023.

139. **PLEADING**—Reason for New Trial.—Where upon the face of a pleading it appears that one of defendants has no interest in the matter in controversy which the judgment rendered in any way affects, and a motion for a new trial is joint as to all defendants, it is properly overruled.—*Jones v. Peters*, Ind., 62 N. E. Rep. 1019.

140. **PLEADING**—Waiver of Objection.—After a trial on the theory that the petition was duly filed, a defeated party cannot, after verdict, urge that there was no petition on file and no cause pending.—*Heater v. Penrod*, Neb., 89 N. W. Rep. 762.

141. **POSTOFFICE**—Postmaster's Salary.—A readjustment of the salary of a postmaster, under Act Cong. March 3, 1883, and Act Cong. Aug. 4, 1886, must be made to begin with the next succeeding quarter, and cannot be applied to the period for which the returns have been made.—*United States v. Ewing*, U. S. S. C., 22 Sup. Ct. Rep. 480.

142. **PRINCIPAL AND AGENT**—Agent's Authority.—In an action for breach of contract of employment, evidence of defendant's custom to employ men for no definite time held to bear on the question of the foreman's authority to employ plaintiff for a definite time, and not limited merely to the question whether he was so employed.—*Ames v. D. J. Murray Mfg. Co.*, Wis., 89 N. W. Rep. 886.

143. **PROCESS**—Citation.—Where a defendant demurred to a first amended original petition, and it was sustained, no new citation was necessary on the second amended pleading, filed at a subsequent term, stating the same cause of action.—*Wisbey v. Houston Nat. Bank*, Tex., 67 S. W. Rep. 195.

144. **PROHIBITION**—Federal Courts.—A writ of prohibition against proceedings in a circuit court of the United States will not be granted by the supreme court, where an appeal could be taken from the decision to the circuit court of appeals and then to the supreme court.—*In re Huguley Mfg. Co.*, U. S. S. C., 22 Sup. Ct. Rep. 455.

145. **PUBLIC LANDS**—Private Claims.—An unexplained delay of over six years after a land grant had been confirmed by the court of private land claims will defeat the right to recover a money judgment against the United States, under Private Land Claims Act, § 14, for the value of the lands disposed of by the United States to third parties.—*United States v. Martinez*, U. S. S. C., 22 Sup. Ct. Rep. 422.

146. **RAILROADS**—Failure to Give Signal.—Action against a railroad company for death, resulting from failure to give signal of the approach of train at crossing, held to be for the jury.—*Chesapeake & O. Ry. Co. v. Dupree's Admr.*, Ky., 67 S. W. Rep. 15.

147. **RAILROADS**—Unattended Engine.—A railroad company held guilty of negligence in leaving an engine unattended, with steam up, at a public crossing.—*Texas Midland R. R. v. Cardwell*, Tex., 67 S. W. Rep. 157.

148. **REPLEVIN**—Evidence of Ownership.—In replevin, where plaintiff claims absolute ownership and right to possession, and defendant's answer is a general denial, if plaintiff fails to show the same, the court may direct verdict for defendant.—*G. T. Northwall Co. v. Strong*, Neb., 89 N. W. Rep. 767.

149. **SALES**—Contingent Contract.—Obligation to purchase goods under a contract providing for a sale to the lessor, in case a lease should not be renewed at a stipulated time, held not to have been created by a failure to renew the lease, made subsequent to the time stipulated.—*Hangsterfer v. Shafer*, Mich., 89 N. W. Rep. 735.

150. **SCHOOLS AND SCHOOL DISTRICTS**—Premature Applications to Purchase.—Where applications to purchase school lands were both premature, land held properly awarded to party first filing the application.—*Hazlewood v. Rogan*, Tex., 67 S. W. Rep. 80.

151. **SCHOOLS AND SCHOOL DISTRICTS**—Sale of Public Lands.—The republic of Texas held to possess the power to designate the purposes for which the proceeds from the sales of public lands of a municipality might be appropriated.—*Board of School Trustees of the City of Antonio v. Galveston, H. & S. A. Ry. Co.*, Tex., 67 S. W. Rep. 147.

152. **SPECIFIC PERFORMANCE**—Statute of Frauds.—Where, in an action for specific performance, the evidence shows full performance by the vendee and partial performance by the vendor, the statute of frauds will not prevent a decree for performance.—*Lucas v. Lucas*, Neb., 89 N. W. Rep. 769.

153. **STATUTES**—Interpretation.—Practical construction put upon a statute by executive officers will not be resorted to in aid of the interpretation, unless the construction involved is one of doubt.—*Studebaker v. Perry*, U. S. S. C., 22 Sup. Ct. Rep. 463.

154. **STREET RAILROADS**—Reduction of Fares by Ordinance.—A reservation in an ordinance granting a street railway franchise of the right to make further regulations does not include the right on the part of the city to reduce the rate of fare agreed upon.—*City of Detroit v. Detroit Citizens' St. Ry. Co.*, U. S. S. C., 22 Sup. Ct. Rep. 410.

155. **SUNDAY**—Contract of Employment.—Cr. Code, § 241, providing for the punishment of persons sporting on Sunday or found at common labor, does not render a contract for theatrical performance on Sunday contrary to public policy.—*Wirth v. Calhoun*, Neb., 89 N. W. Rep. 785.

156. **TAXATION**—Application of New Laws to Delinquent Taxes.—A state may adopt new remedies for the collection of taxes and apply them to taxes already delinquent, without violating the United States constitution.—*League v. State of Texas*, U. S. S. C., 22 Sup. Ct. Rep. 475.

157. **TAXATION**—Foreclosure of Tax Certificate.—In an action to foreclose a tax sale certificate and to recover subsequent taxes paid, the certificate and receipts held *prima facie* evidence of the validity of the taxes represented by them.—*Concordia Loan & Trust Co. v. Van Camp*, Neb., 89 N. W. Rep. 744.

158. **TAXATION**—Tax Deed.—Gen. St. 1894, § 4616, requiring payment of taxes due on lands forfeited to the state at a tax sale under that section, is mandatory, and a tax deed, conveying title by the state through the county auditor, without such payment, transfers no title.—*Hoyt v. Chapin*, Minn., 89 N. W. Rep. 850.

159. **TOWNS—Bonds to Aid Railroads.**—By Sp. Laws Minn. 1908, p. 47, the whole matter of whether bonds should be issued by a town to aid a railroad, and the amount thereof, was relegated to the judgment of the legal voters of the town, and the bonds issued pursuant to such authority are valid.—*Town of Alden v. Easton*, U. S. C. C. of App. Eighth Circuit, 113 Fed. Rep. 60.

160. **TRESPASS—Patent to Land.**—The validity of a patent to land cannot be attacked by one in possession as a trespasser of land covered by the patent.—*Yarbrough v. De Martin*, Tex., 67 S. W. Rep. 177.

161. **TRESPASS—School Lands.**—In an action between adverse claimants of school lands, certified copies of proofs of occupancy, filed in the general land office by one through whom plaintiff claims title, are not competent evidence.—*Spence v. Dawson*, Tex., 67 S. W. Rep. 180.

162. **TRIAL—Absolute Deed as a Mortgage.**—It is error to instruct the jury that, to justify a finding that an absolute deed is a mortgage, such fact must be shown by clear and certain evidence.—*Palm v. Chernowsky*, Tex., 67 S. W. Rep. 165.

163. **TRIAL—Examination of Witness.**—It is within the discretion of the court to permit two counsel on the same side to examine a witness.—*Citizens' Bank v. Fromholz*, Neb., 89 N. W. Rep. 775.

164. **TRIAL—Market Value.**—In an action for damages for injury to land, the defendant not having requested an instruction as to the legal meaning of the term "market value," cannot complain of the court's failure to give such instruction.—*Texarkana & Ft. S. Ry. Co. v. Spencer*, Tex., 67 S. W. Rep. 196.

165. **TRIAL—Parol Testimony of Contents of Written Instrument.**—It was not error to admit testimony in a deposition of a witness beyond the jurisdiction of the court as to the contents of a written instrument, without accounting for its non-production; it appearing improbable that it could have been produced.—*Missouri, K. & T. Ry. Co. of Texas v. Dilworth*, Tex., 67 S. W. Rep. 98.

166. **TRIAL—Separation of Witnesses.** Where the rule as to sequestration has been invoked as to witnesses, and a witness has been told what a witness for plaintiff had sworn, the court may in its discretion permit such witness to testify to matters tending to impeach plaintiff's witness.—*Crawleigh v. Galveston H. & S. A. Ry. Co.*, Tex., 67 S. W. Rep. 140.

167. **TRIAL—Testimony in Rebuttal.**—It is error for the court to refuse to permit a witness to testify in rebuttal, after the other witnesses have been discharged, on the representation that a different witness was the only one to be called.—*Glenn v. Stewart*, Mo., 67 S. W. Rep. 237.

168. **TRUSTEE—Secret Profits.**—Trustee in purchase of land held accountable for secret profits shared with part of his associates.—*Davis v. Hoffman*, Mo., 67 S. W. Rep. 234.

169. **TRUSTS—Deficiency Judgment.**—Defendant cannot be granted a deficiency judgment after failing to appeal from final judgment, which merely gave him a lien on plaintiffs' land for a certain amount.—*Fuller v. Abbe*, Wis., 89 N. W. Rep. 825.

170. **TURNPIKES AND TOLL ROADS—Presumption of Negligence.**—Where a traveler is injured by the falling of a tollgate pole, a presumption of negligence arises which shifts the burden of proof upon the turnpike company to show that the accident was not caused by its negligence.—*Hydes Ferry Turnpike Co. v. Yates*, Tenn., 67 S. W. Rep. 69.

171. **UNITED STATES—Public Works.**—The secretary of the navy may direct a change in the contract for the construction of a dry dock for the United States which he was authorized by law to construct.—*United States v. Barlow*, U. S. S. C., 22 Sup. Ct. Rep. 468.

172. **VENDOR AND PURCHASER—After-Acquired Title.**—A deed acquired by defendants in a suit for foreclosure of a contract for a sale of realty, after *lis pendens* had been filed, from plaintiff's grantee, held to inure to benefit of

plaintiffs.—*Emerson v. Schwindt*, Wis., 89 N. W. Rep. 822.

173. **VENDOR AND PURCHASER—Insurance Money.**—Where contract to convey obligated vendee to keep the improvements insured, and they burned down, vendee could not require application of the insurance money to the satisfaction of the unmatured installments of purchase price.—*Naquin v. Texas Saving & Real Estate Inv. Assn.*, Tex., 67 S. W. Rep. 85.

174. **VENDOR AND PURCHASER—Lien for Purchase Price.**—A parol purchaser is entitled, on rescission of the contract, to a lien on the land for the purchase money paid.—*Lyttle v. Davidson*, Ky., 67 S. W. Rep. 34.

175. **VENDOR AND PURCHASER—Purchaser Assuming Vendor's Debt.**—Purchasers of land who, in consideration thereof, assume a debt of the vendors, may urge partial failure of title against the creditor.—*Talbott v. Campbell*, Ky., 67 S. W. Rep. 53.

176. **VENDOR AND PURCHASER—Specific Performance.**—An alleged contract for the sale of land, not mentioning the purchaser, held not sufficiently certain for specific performance.—*Cusenbary v. Latimer*, Tex., 67 S. W. Rep. 187.

177. **WATERS AND WATER COURSES—Drains.**—In an action against several persons constructing ditches and drains, unnaturally discharging large quantities of water on plaintiff's land, evidence held to sufficiently connect one of the defendants with the construction of the ditches to justify a verdict against him.—*Breen v. Hyde*, Mich., 89 N. W. Rep. 732.

178. **WATERWORKS—Contract of Village to Purchase.**—An implied contract that a village will not construct its own waterworks after expiration of a contract for the supply of water held not to arise under the evidence.—*Skaneateles Waterworks Co. v. Village of Skaneateles*, U. S. S. C., 22 Sup. Ct. Rep. 400.

179. **WILLS—Codicil.**—Codicil held to republish a will to which it directly referred, and to revoke an intermediate will.—*In re Campbell's Will*, N. Y., 62 N. E. Rep. 1070.

180. **WILLS—Defeasible Fee.**—Where a testator devised property to his wife for life, at her death to be divided among his children, the share of any child that might then be dead to go to his children, each child took his share subject to be defeated by his death before the life tenant.—*Aultman Co. v. Gibson's Guardian*, Ky., 67 S. W. Rep. 57.

181. **WILLS—Devisee's Liability for Debt of Testator.**—A devisee, by accepting the personal estate bequeathed to her, held liable for a debt with which she was charged by the will only to the extent of the value of such personality.—*Schaefer v. Voght's Trustees*, Ky., 67 S. W. Rep. 54.

182. **WILLS—Execution.**—In the absence of clear proof to the contrary, it will be presumed the signing of a will by testator was before that of witnesses.—*Flood v. Kerwin*, Wis., 89 N. W. Rep. 845.

183. **WILLS—Rights of Husband.**—Where the wife makes no provision whatever for her husband by her will, it is not necessary for him to renounce the will in order to entitle him to one-half of the surplus personality left by her, as provided by Ky. St. § 2132.—*Smoot v. Heyser's Exr.*, Ky., 67 S. W. Rep. 21.

184. **WITNESSES—Incriminating Evidence.**—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony cannot be used against him, he is not compelled by such assurance to relinquish his constitutional privilege where the answer may tend to criminate him.—*Foot v. Buchanan*, U. S. C. C., N. D. Miss., 113 Fed. Rep. 156.

185. **WORK AND LABOR—Implied Contract.**—Services rendered to a brother in superintending erection of houses for 10 months held not gratuitous, but on implied contract to pay therefor; both brothers being married, living apart, and not dependent.—*Williams v. Williams*, Wis., 89 N. W. Rep. 835.